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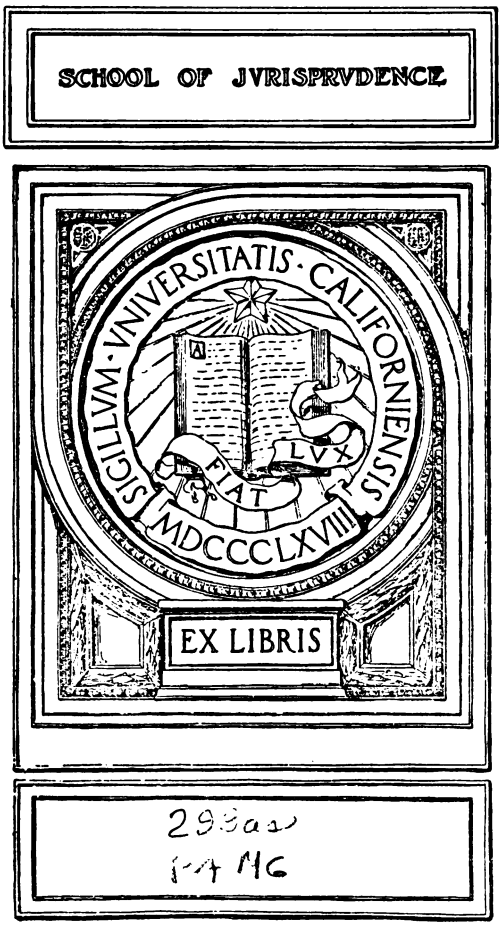

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MONTGOMERY COUNTY

LAW REPORTER

CONTAINING CHIEFLY

REPORTS OF CASES

DECIDED BY

THE COURTS OF MONTGOMERY COUNTY.

FOR THE YEAR 1905.

VOL. XXI.

REPORTED BY F. G. HOBSON,
OF THE MONTGOMERY COUNTY BAR.

NORRISTOWN, PA.
1905.

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Court of Common Pleas of Montgomery County.

HANNAH P. SATTERTHWAITE VS. ISAAC BROOKS.

Promissory note—Statute of limitations—Promise to pay interest if other debtor did not do so—Promise of one joint debtor.

Payment of one of two joint debtors or promissors not partners will not remove the bar of the statute as to the other.

A promise of one joint debtor "that he would see Harry [the other joint debtor] and see that he paid the interest, and that if Harry didn't pay it he would, as he didn't want Hannah [the creditor] to lose anything, and that Hannah should not lose anything," no note being produced or mentioned or any date or amount or balance mentioned, is not sufficient to toll the statute.

A husband who loans the money of his wife to a person knowing that fact, will be considered the authorized agent of the wife in the transaction, and a proper acknowledgment of the debt to him is equivalent to an acknowledgment to the wife.

ASSUMPSIT. No. 26, December T., 1903.

Evans, Holland & Dettra, Esqs., for plaintiff.

Larzelere, Gibson & Fox, Esqs., for defendant.

Opinion of the court by WEAND, J., December 5, 1904.

This case was tried before the court, without the intervention of a jury, under the provisions of the act of April 22, 1874, P. L. 109.

The suit is on a promissory note given by defendant and Harry Brooks to order of plaintiff, for $300, dated Fourth-month 2, 1888, and payable one year after date, with interest. The defendant pleads the statute of limitations.

FINDINGS OF FACT.

1. In 1888 the defendant, Isaac Brooks, met William H. Satterthwaite, the husband of plaintiff, and requested loan of money.

2. In consequence of said request Mrs. Satterthwaite loaned, as stated in next finding, the sum of $300.

3. This money was borrowed by defendant for Harry Brooks; and a joint and several note for $300, dated April 2, 1888, signed by defendant and Harry Brooks, payable one year after date, with five per cent. interest, was given to plaintiff.

4. The suit was brought October 23, 1903.

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5. No payments were made by Isaac Brooks, the defendant within six years of the bringing of the suit; but on April 1, 1889, Harry Brooks paid on account of the interest on said note $43.20.

6. When Mr. Satterthwaite agreed that his wife should loan the money he knew that it was for the use of Harry Brooks; but he refused to take the individual note of Harry Brooks, and insisted that Isaac Brooks should sign the note. Defendant was surety on the note.

7. In March, 1899, Mr. Satterthwaite, the husband of plaintiff, met defendant and reminded him that interest for several years was due, and that it must be settled, when defendant "promised that he would see Harry and see that he paid the interest, and that if Harry didn't pay it he would, as he didn't want Hannah to lose anything and that Hannah should not lose anything."

8. When the above conversation took place William H. Satterthwaite was acting as authorized agent of plaintiff to the knowledge of defendant.

CONCLUSIONS OF LAW.

1. That the conversation referred to in findings of fact seven is not sufficient to toll the statute.

2. That payment by Harry Brooks does not bind defendant.

3. That judgment must be given for defendant with costs.

ARGUMENT.

Under the findings of fact three questions arise for our consideration.

1. Was the promise made to an authorized agent of plaintiff or to a person interested.

2. Was the promise sufficient to bar the running of the statute.

3. Does the payment made by Harry Brooks create a liability on the part of defendant, whether he was principal or surety.

The whole transaction shows that the money was borrowed from plaintiff through her husband, who arranged the loan, the character and giving of the note. The defendant knew that Mr. Satterthwaite was acting for his wife and that he had an interest in securing to her the payment of interest, as it was through his (the husband's) intervention that the money was loaned.

We are, however, of opinion that the promise as testified to

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was not sufficient to bind the defendant. No particular note was mentioned, no amount stated or alluded to, and no note produced. In fact the word "note" was not mentioned in the evidence of Mr. Satterthwaite but only "interest." In reply to the question of counsel, "What did he promise about the note?" his answer was a promise about interest, but interest on no particular note.

A case almost identical in point is Landis vs. Roth, 109 Pa., 64. In that case the testimony of plaintiff was "when I got to Henry Landis I said 'I come for money,' and he said, 'I will pay you six hundred dollars in thirty days on the note [this note]. I will pay you the rest as quick as I can, but you must not be too hard on me.' The old lady, Mrs. Henry Landis, spoke up, saying, 'Roth, we will pay you every dollar if we have to pay it out of our pocket.' Henry said, 'yes, we will pay you.'"

This language was held insufficient to secure the bar of the statute. The court said "the debt was not sufficiently identified. In the conversation testified to by the plaintiff there is not a word as to the date of the note, its amount or the balance due thereon. The note itself was not produced, and there is no evidence that the plaintiff had it with him. There is no certainty as to what debt or what note was referred to; any uncertainty, either in the acknowledgment or identification of the debt, is fatal: Burr vs. Burr, 2 Casey, 284 (26 Pa., 284)."

In the last cited case there was no evidence of the existence of any other note between the parties; yet it was held that the acknowledgment was insufficient, although there was a payment on account. Landis vs. Roth, *supra*, has been cited so frequently with approval that it can no longer be questioned as authority.

"An acknowledgment and promise to pay a debt sufficient to toll the bar of the statute of limitations, must contain a clear and unequivocal acknowledgment of the debt, a specification of the amount of it, or a reference to something by which the amount can be definitely and certainly ascertained, and an express or implied promise to pay it:" Ward vs. Jack, 172 Pa., 416.

In Klock vs. Bressler et al., 2 Leg. Rec., 191, Bechtel, J., held that "the payment of interest by the principal of a note within the statutory period does not remove the bar of the statute of limitations as to a surety who had no knowledge of such payment."

In Coleman vs. Fobes, 22 Pa., 156, it was distinctly ruled that

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a partial payment on a promissory note by one of two joint debtors, not partners at the time, will not avoid the bar of the statute of limitations as respects the other party. In that case the payment was made by the surety on a joint note. See also Bush vs. Stowell et al., 71 Pa., 208; Clark vs. Burn et al., 86 Pa., 502.

The authorities cited show that payments by one of two joint debtors or promissors will not remove the bar of the statute as to the other. If plaintiff's contention is correct, that defendant was the principal, then Harry Brooks was surety, and the case of Coleman vs. Fobes, *supra*, decides the point.

VERDICT.

And now, December 5, 1904, verdict for defendant with costs; and if no exceptions are filed in the office of the prothonotary within thirty days after notice of the filing of this opinion and findings, the prothonotary will enter judgment accordingly.

JAMES SMITH VS. GEORGE D. HAGEY.

Where a plaintiff calls a witness whom he knows will testify against him on the point for which he is called, he will not be allowed to introduce evidence to contradict the witness, there being no allegation of surprise or mistake.

Where an agreement in writing is signed with full knowledge of its contents after reading it and having it explained, he can not by his own testimony show that it was to have an entirely different meaning, there being no allegation of fraud, accident or mistake.

A receipt in full of all demands is *prima facie* evidence of settlement and can not be set aside except for weighty reasons, such as fraud, accident or mistake, which must be made to appear distinctly; if the evidence is evenly balanced, the receipt must control.

MOTION for a new trial. No. 182, June T., 1903.

J. A. Strassburger, Esq., for plaintiff.

Larzelere, Gibson & Fox, Esqs., for defendant.

Opinion of the court by WEAND, J., December 5, 1904.

Defendant was the owner of a stone quarry property, with fixtures, stock, etc., which plaintiff alleges he was employed to sell at fixed commissions. He claims $100 for sale of personalty, $25 for money paid to satisfy a judgment on the land, and $4,500 for sale of realty—in all $4,625. Defendant denied the agreement for commissions and payment of the $25, as testified to by plaintiff.

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Their disputes resulted at a meeting at the Vendig Hotel, in Philadelphia, when it was agreed to settle upon terms as shown by a receipt offered in evidence by defendant. Plaintiff met Mr. Harkins, attorney for defendant, at his office, and there received a check, which was paid to him, for $250, and signed the following receipt, which was first read and explained to him:

"Received, Philadelphia, November 1, 1902, of George D. Hagey, of Plymouth Meeting, Montgomery county, Pa., two hundred and fifty dollars, on account of the sum of five hundred dollars, agreed by him to be paid me for effecting the sale of his lime-stone quarry, in said Montgomery county. The balance, to wit, two hundred and fifty dollars, to be paid to me by him on the payment of the promissory note of William H. Allen, the purchaser of the said quarry, to said George D. Hagey, dated October 15, 1902, at six months, for one thousand dollars; and on the payment to me of the said sum of two hundred and fifty dollars, the same to be in full payment and satisfaction to me of all claims and demands against George D. Hagey to date. James Smith."

The one thousand dollar note of William H. Allen has never been paid. The receipt admits that only $500 was to be paid for effecting the sale; and the payment of the $250, etc., referred to the amount then paid plaintiff, for he was only to receive the other $250 when Allen paid his note.

To avoid the effect of this receipt plaintiff proposed to show that at the time Mr. Harkins laid that receipt before Mr. Smith to sign it that Mr. Smith said to him, "Mr. Harkins, if I sign this paper will it interfere with my recovery of the money if that note is not paid when it comes due?" and Mr Harkins said "it would not." This offer was refused. Plaintiff then renewed his offer as follows: "I will offer to prove by this witness (plaintiff) that he was induced to sign this paper by a statement that Mr. Harkins that in the event that this $250 was not paid he would have his full rights to recover against George Hagey, meaning by that if the $250 had not been paid, then and there, or had not been since, that Mr. Smith would have been perfectly willing to have accepted that as a compromise settlement; but not having paid it, he was relegated back to his original rights under his original contract." On objection by the defendant this was refused. Plaintiff had first introduced the depo-

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sition of Mr. Harkins, who denied any such agreement or understanding, saying "the receipt expresses the arrangement that was made between the parties and speaks for itself."

The effect and purpose of this offer was:

1. To contradict plaintiff's own witness.
2. To directly contradict the terms of a written paper.
3 To contradict his receipt,

There was no offer to show that the receipt did not cover the $125, or that there was fraud or mistake, or that the testimony of Harkins had taken him (plaintiff) by surprise.

1st. To the rule that a plaintiff can not discredit his own witness there are exceptions, as where a party is under the necessity of calling a witness for the purpose of satisfying the formal proof which the law requires he is not precluded from calling other witnesses who may give contradictory testimony; or where the subscribing witnesses to a will testified to the incapacity of the testator, yet the devisees were allowed to go into other evidence to support it; or where a witness by surprise gives evidence against the party who calls him, that party will not be precluded from proving his case by other witnesses, and a party may resort to other evidence to prove his case though denied by the witness first called to support it: Stockton & Stokes vs. Demuth, 7 Watts, 39. Neither of these conditions existed. The effect of the proposed testimony was to contradict Harkins and thus discredit his testimony and impeach his veracity It was not a difference of judgment, or of surprise, or of compulsion. Here plaintiff knew what Harkins would testify to, for the deposition was taken in plaintiff's presence and was on file with the records of the case. We do not think that where a party calls a witness to prove a particular fact, knowing that the witness will testify against him, he can then introduce testimony to contradict that witness. In Stearns vs. Merchants Bank, 53 Pa., 490, the court said: "Smith vs. Price, 8 Watts, 447, is not against the rule contended for. The effort in that case was to call a witness who it seems it was known would swear against the defendant, and then to introduce his former testimony before arbitrators to the contrary as independent evidence of the fact denied. This the court said could not be done, and that this was what was attempted appears from the first sentence of Gibson, C. J., who it is presumable wrote the per curiam. 'This,' says

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he, 'was a very ingenious device; but it must not succeed.' He then goes on to repudiate the attempt. The declaration that a man shall not discredit his own witness under such circumstances no one will dispute." The cases are analogous.

2d. The effect of the proposed testimony was to contradict the writing. The very object of placing the exact terms of an agreement in writing is that it shall show exactly what was agreed upon. The plaintiff had the receipt explained to him and read it. He signed it with full knowledge of what it contained; and it was written in accordance with the result of prior negotiations. He alleges neither fraud nor mistake in its execution; but offers to show that although it distinctly expresses one thing it was understood and agreed to mean exactly the opposite. If this is competent testimony, then written agreements are worthless. We hold it to be the law that when a party deliberately and with full knowledge of its contents affixes his name to a paper, in the absence of fraud or mistake, he will not be allowed by his own testimony to contradict the paper by showing that it was not intended to have the effect as written.

3d. The receipt reads "to be in full payment and satisfaction to me of all claims and demands against George D. Hagey to date." His claims included the $125.

It is unquestionable that under certain circumstances a receipt may be explained; but the rule has its limitations. In Flynn vs. Hurlock, 194 Pa., 462, it was said: "Where a receipt is given 'in full of all demands' because the debtors refused to pay any more money without it, the creditor must be assumed to have received the money upon the express condition that it was in full of all demands, and he is concluded by it, notwithstanding his assertion at the time that he 'waived no rights.' He signed it with his eyes open, without any fraud, artifice, mistake or imposition practiced upon him, and he is consequently bound by it."

In Rhoads's Estate, 189 Pa., 460, the receipt read: "October 1, 1894. Received of S. Oliver Rhoads seven hundred dollars in full of all claims from him." The court said: "Of course it must be assumed that the receipt was given for some purpose, and that it was not a mere meaningless paper. In the present case the receipt is dated October 1, 1894; and as it is proof of settlement at that date between the parties, it necessarily includes all claims held by the decedent at that time against appellant. If it does not mean that it is

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a useless instrument, and the giving of receipts in full in final settlement between parties might as well be abandoned." See also Daly vs. Dallmeyer, 20 Superior Court, 366.

"A receipt in full is *prima facie* evidence of settlement, and can not be set aside except for weighty reasons, such as fraud, accident or mistake, which must be made to appear distinctly; if the evidence is evenly balanced, the receipt must control": McDonald, to use, vs. Piper et al., 193 Pa., 312.

The acceptance of the $250 then paid and the interest of plaintiff in the Allen note amounted to accord and satisfaction, which may be done by a receipt in full or in other modes. All that is requisite is that the debtor should have executed the new contract to that point whence it was to operate as satisfaction of the preëxisting liability, in the present tense: Laughead vs. Frick Co., 209 Pa., 368.

This was a disputed debt, and the acceptance of the defendant's check and the plaintiff's interest in the Allen note operated as a good accord and satisfaction: Bank vs. Huston, 11 W. N. C., 389.

And now, December 5, 1904, the motion for a new trial is overruled, and judgment is directed to be entered on the verdict on payment of the verdict fee.

PETER V. HOY VS. MONTGOMERY MUTUAL FIRE INSURANCE COMPANY.

A condition of a fire insurance policy provided that in case of loss a committee should inquire of the damages sustained, and make report of same; and if not appealed from within twenty days, "should become final between the parties." *Held*, that on failure of either party to appeal, the company was bound by the report of the committee; and on a suit to recover the amount awarded, it could not make defence that it was only proportionately liable.

To constitute double insurance there must be other valid existing policies; and the burden of proof is on the defendant.

MOTION for judgment *non obstante veredicto* and for new trial. No. 17, June T., 1904.

J. V. Gotwalts and *Henry Freedley, Esqs.*, for plaintiff.

E. F. Slough, Esq., for defendant.

Opinion of the court by WEAND, J., December 5, 1904.

Plaintiff's property was insured for $4,000 in defendant company by policy issued January 18, 1902. A loss by fire having occurred the insurance company was notified, and a committe was ap-

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pointed to ascertain the loss sustained by plaintiff. The committee made report that the sum which plaintiff was legally entitled to was $1,000. The act of incorporation of defendant company provided, "which said sum as fixed by said committee, if not appealed from by either party within twenty days from the finding and report of the same, shall become final between the parties." Neither party appealed from the report of the coumittee. The policy sued upon described the property insured as "four-story brick hotel, known as the Hotel Montgomery, situate, etc. This insurance to cover additions and alterations." The policy also recited "insured in the Montgomery Mutual Fire Insurance Company on above hotel, $9,500."

The company defendant contended that it was only liable *pro rata* with the insurance of $9,500 in the other company. The fire occurred December 16, 1903.

A by-law of defendant company provided that "any member insuring in other companies, covered in part by this company, his or her policy shall be considered sunk, provided the same is not approved by this company and endorsed on his or their policy, in which case this company shall be only liable to the payment of a ratable proportion of any loss or damage which may be sustained."

There was no evidence to show that the $9,500 insurance was in force at the time of the fire. To constitute double insurance there must be other valid existing policies. Nor does the evidence show distinctly whether the fire occurred in the hotel proper or in additions thereto. Defendant presented the following point: "If the defendants assumed the risk under this policy upon the faith of the representations of the assured that there was ninety five hundred dollars other insurance upon the same property, then in any event the defendants would only be liable under their policy for the ratio or proportion of the loss incurred as the amount of their policy bore to the total represented insurance; or, in other words, to eight twenty-sevenths of the total loss by said fire."

Defendants offered no testimony to show that they so insured, or that any representations were made except as shown on the application and policy. The court reserved the question of law as to whether the plaintiff is entitled to recover more than eight twenty-sevenths of the total loss by said fire.

The plaintiff having shown his loss, and it not being denied that

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it amounted to $1,000, the defendant had the burden of proof to show why it should not pay.

The defence was "double insurance." The proof did not sufficiently establish the fact. The first policy covered only the hotel; the second also covered additions and alterations. If the fire was to the hotel proper, defendant should have shown it. On the contrary, if the evidence shows anything in relation to the subject it is that the additions and alterations were burned; but there was no evidence that the first policy was subsisting or covered the part burned. But apart from this we are of opinion that the defence must fail, because the finding and report of defendant's own committee unappealed from fixes its liability.

The duty of the committee, after receiving notice of loss, was to "examine into the same and inquire of the damages sustained, and make report of the sum which said parties may be legally entitled to, which said sum as fixed by said committee if not appealed from by either party within twenty days from the finding and report of the same shall become final between the parties"—legally entitled to receive from whom? Not from other parties, for the committee had no such power; and, therefore, from their own company. It was to become final "between the parties" to *this* contract; not to any other.

If the committee had authority to apportion the loss they should have done so, in order that the plaintiff might be informed of the fact to enable him to appeal. There was no testimony to show that plaintiff had made claim or had received anything from the other company; and it is now too late to make such claim, if he ever had any, as the result of this fire.

Mr. Hoy testifies that after the adjustment of his loss he was offered $400, which he refused. According to defendant's contention, if sustained, it was liable for only $296.20. In making this offer they gave plaintiff no notice that the other company was liable; and the fact that they offered more than their *pro rata* share would appear to be more in the light of a compromise than a denial of total liability.

There was no evidence whatever to show that plaintiff agreed to continue the $9,500 policy.

And now, December 5, 1904, the motions for judgment *non obstante veredicto* and for a new trial are overruled, and judgment is directed to be entered on the verdict on payment of the verdict fee.

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Orphans Court of Montgomery County.

Estate of Susan H. Roberts, Deceased.

A county is liable for the maintenance of an indigent insane person committed by the court to an insane hospital, and if he has relatives who by law are bound for his support the county can recover from them. The mother of such person being of sufficient ability is liable under the act of June 13, 1836, P. L. 539, and a county is entitled to recover from her estate the amount expended by it for such indigent insane child.

Hilegass & Larzelere, Esqs, for accountants.

J. P. Hale Jenkins, Esq., for county of Montgomery.

Opinion of the court by Solly, P. J., December 1, 1904.

The adjudication of the first and final account of the executors, with schedule of distribution of the balance of the estate remaining in their hands, was filed November 11, 1904, and confirmed *nisi*. On November 15, 1904, the county of Montgomery, by its solicitor, J. P. Hale Jenkins, Esq., presented a petition averring that it had a good and valid claim against the estate for the sum of $546, for the maintenance of Edward F. Roberts, one of the sons of the decedent, for six years last past, at the Hospital for the Insane for the South-eastern District of Pennsylvania, at Norristown, the county commissioners having paid the same to the trustees of the hospital for that period at the rate of $1.75 per week.

The petition further set forth that the said son was committed to the hospital August 25, 1885, and the decedent paid for his maintenance there for several years, but that she had not paid for a long period of time; and the fact that the decedent was the mother was overlooked at the time when the account was before the court for audit.

Basing their claim upon the act of Assembly that the mother was liable to the county for the maintenance of the son as an indigent person, the court was asked to reopen the adjudication in order that the county might present its claim.

On consideration we ordered the petition to be placed on the argument list for November 22, 1904; suspended the absolute confirmation of the adjudication pending the disposition of the petition, and directed notice of the audit to be given by the clerk to counsel for the petitioner and for the executors of the decedent. Service of the order was accepted by the respective counsel for the parties.

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Roberts's Estate.

At the hearing it was admitted that Edward F. Roberts has been an inmate of the Insane Hospital for nineteen years; that he is an indigent person; and that the mother, this decedent, had for a time reimbursed the county for the expenses of his maintenance at that institution. No answer was filed denying any of the facts averred in the petition. It was conceded by the county solicitor that the claim could not be sustained for a longer period than six years, by reason of the statute of limitations.

The act of Assembly under which it is sought to hold this estate liable for the claim of the county is that of June 13, 1836, Sec. 28, P. L. 539, 2 P. & L. 3544, which provides that "the father and grandfather, and the mother and grandmother, and the children and grandchildren of every poor person not able to work, shall, at their own charge, being of sufficient ability, relieve and maintain such poor person," at such rate as the Court of Quarter Sessions shall direct Under this act, a relative or relatives named therein is liable for the maintenance of an indigent insane person confined in a state hospital for the insane. In the case of Township of Franklin vs. Pennsylvania State Lunatic Hospital, 30 Pa., 522, it was held that the overseers of the proper township are liable for the maintenance of an insane person committed to the state hospital by the Court of Quarter Sessions; and if the lunatic has relatives, who by law are bound for his support, the local authorities must look to them for reimbursement. This case is affirmed in Shenango Township vs. Wayne Township, 34 Pa., 184; Lower Augusta Township vs. Northumberland County, 39 Pa., 143; and Wertz vs. Blair County, 66 Pa., 18.

In this case it appears that Edward F. Roberts was committed to the Insane Hospital by the court of this county; and as the county became liable for his maintenance, it is clear that under the authorities above quoted the county has the right, under the act of June 13, 1836, to recover from his mother's estate the amount expended by them in his behalf. The claim is therefore allowed.

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Court of Common Pleas of Montgomery County.

ANGELINA SHELLY, EXECUTRIX OF MOSES SHELLY, DECEASED, VS. THE PHILADELPHIA AND READING RAILWAY COMPANY.

No. 62, December T., 1903.

ANGELINA SHELLY, EXECUTRIX OF MOSES SHELLY, DECEASED, AND G. FRANK DIETERLY, THE SAID MOSES SHELLY AND G. FRANK DIETERLY BEING LATE COPARTNERS, TRADING AS SHELLY & DIETERLY, VS. THE PHILADELPHIA AND READING RAILWAY COMPANY.

No. 63, December T., 1903.

Fires from sparks of an engine; evidence confined to engine designated in statement; identification of engine throwing fires on other nights; view by jury of engine and spark arrester.

Where the injury complained of is shown to have been caused, or, in the nature of the case, could only have been caused, by sparks from an engine which is known and identified, the evidence must be confined to the condition of that engine, its management and its practical operation.

There is no presumption that the same train is drawn by the same engine from day to day; and if there is such presumption, it must give way to the positive evidence that such is not the fact in the particular case.

The mere fact that sparks are thrown from the stack of an engine is not in itself evidence of negligence.

It is not improper to allow a jury to view and inspect the spark arrester as connected with the engine where the jury is cautioned that the object of the view is to enable them the better to understand the testimony delivered before them from the witness stand.

MOTION and reasons for a new trial.

N. H. Larzelere and *A. R. Place*, *Esqs.*, for plaintiffs.

Montg. Evans, *Esq.*, for defendant.

Opinion of the court by SWARTZ, P. J., January 3, 1905.

The plaintiffs' statement charges that the defendant company was negligent in operating the engine drawing a train of freight cars on May 28, 1903, between the hours of nine and ten o'clock, on the south-bound track, as it passed south along plaintiffs' buildings. It is further charged in the statement that this engine, as it passed along the buildings, emitted on that night large quantities of live coals and sparks, and thereby destroyed the plaintiffs' property.

The witnesses called by the plaintiffs identified this train as the

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New York milk train, which passed the station at Telford—where the plaintiffs' buildings were located—shortly before ten o'clock. It passed down every night between nine and eleven o'clock.

Counsel for plaintiffs assigned two errors upon which they base their motion for a new trial.

First, it is claimed that there was error in striking from the testimony that part of the evidence given by several witnesses which related to the fire throwing on other nights than that of the fire by the engine or engines which drew this milk train. There was no evidence that the railroad company used the same engine to run the milk train from day to day, and the witnesses could not say that the engine on other nights was the engine that drew the train on the night of the fire.

The second assignment relates to the view which we allowed the jury to take of the engine and the construction of its spark arrester. The jury viewed and inspected the engine which passed Telford station on the night of the 28th of May, pulling the milk train.

A brief statement of the facts and circumstances surrounding the case, we think, will fully answer the objection to this view by the jury.

The spark arrester on the engine was described by the witnesses. The engine was not fitted up with any different spark arrester at the time of the view. Exactly the same character of spark arrester was on the engine at the view that was used on the engine on the night of the fire. The construction was somewhat complicated, and a view would give to the jury a much better understanding of its operation and construction than any explanation given by the witness.

The jury was carefully cautioned that in viewing the engine they must remember that the court does not send them to the engine "for the purpose of seeing the spark arrester that was on the engine on the 28th of May, but to see the kind and class of spark arrester that was in use at that time."

Witnesses testified that to take out the cinders from behind the screen it was necessary to take out the pinnacle or cone-like device, and that when this was removed the inspector could easily see the condition of the mesh of the spark arrester. We told the jury that the object of their view was "to enable them the better to understand the testimony delivered before them."

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LEGAL.

NOTICE.—In the Court of Common Pleas of Montgomery county.

On January 4, 1905, was presented the petition of Mary Ann Corrigan, representing, inter alia, that she is the owner of a certain messuage and lot of land on the southeasterly side of Sylvania avenue, northeasterly from the Fox Chase and Huntingdon turnpike road, in the borough of Rockledge; that on April 1, 1886, Joseph Corrigan, Jr., gave a mortgage to John Davis, trustee, etc., to secure the sum of $3000 on said premises, payable in one year from the date thereof, to the heirs of William Frantz, deceased, $765; to Eliza Ann Frantz, $1127, and to John Davis $1108, or to the legal heirs of either party; that during the year 1890 all the parties entitled to the several sums above mentioned were paid in full, and gave receipts for the same to said John Davis, trustee, etc., but no satisfaction was entered on the record thereof, and said receipts are lost; that each and every one of the parties interested, except William Bennett, George Bennett, Joseph Bennett and Sarah A. Schull, have executed a power of attorney, dated July 13, 1904, authorizing satisfaction so far as their several interests in said mortgage are concerned, but said William Bennett, George Bennett, Joseph Bennett and Sarah A. Schull, though frequently requested to join in said power of attorney, or enter satisfaction themselves on the record of said mortgage, persistently refused to do so, saying that they received the money and gave a receipt for it, and do not propose to do so again.

Notice is hereby given to William Bennett, George Bennett, Joseph Bennett and Sarah A. Schull to appear in said court on Monday, March 6, 1905, at 10 o'clock a. m., to show cause why full satisfaction should not be entered on the margin of the record of said mortgage.

By the Court.

EDGAR MATTHEWS, Sheriff.

C. Henry Stinson, Attorney for Petitioner.

Sheriff's Office, Norristown, Pa.,
January 25, 1905.

NOTICE.—In the Orphans Court of Montgomery county.

Notice is hereby given that on January 18, 1905, the petition of George Bodenstein was presented to said court representing, inter alia, that Jacob Dager was seized in fee of two messuages and a tract of land in Upper Dublin township, said county, situate on a road leading from Whitemarsh road to Susquehanna street, bounded by lands then owned by Joseph Everhart, Henry Scheetz and Christopher Loeser, and containing one hundred and eleven acres, two quarters and twenty perches, and, being so seized, died in the year 1809, intestate, leaving a widow, Mary Dager, and four children, to wit: George Dager, Peter Dager, Sarah, the wife of Adam Mason, and Elizabeth Dager; that in a certain partition proceeding, commenced at the August Term, 1809, of the said court, to partition the said real estate to and among the said heirs of Jacob Dager, deceased, a tract containing eighty-one and one-half acres and twenty perches, being the greater part of the tract above mentioned, was adjudged by the said court, on November 12, 1809, to Adam Mason, in right of his wife Sarah, and a tract containing thirty-two acres one hundred and twenty-eight perches, being composed of the balance of the tract above mentioned and a portion of another tract, was adjudged, on the same date, to the said Peter Dager; whereupon the said Adam Mason gave and executed his several recognizances to each of the said Peter Dager, George Dager and Elizabeth Dager conditioned for the payment of their shares or dividends of the proceeds of the real estate adjudged to him, and, likewise the said Peter Dager gave and executed his several recognizances to the said George Dager, Adam Mason and Elizabeth Dager conditioned for the payment of their shares or dividends of the proceeds of the real estate adjudged to him; that the said petitioner is the owner of a tract of land in the said township, situate on the northerly side of Spring avenue, bounded by lands of Evan Randolph, James Neeley and Henry Shaffer, which said tract is a part of the said tract of land above mentioned, containing one hundred and eleven acres, two-quarters and twenty perches; that the dividends or shares secured as aforesaid by the recognizances to the said Peter Dager, George Dager, Elizabeth Dager, Adam Mason or Sarah Mason became due and payable on November 15, 1810; that more than twenty-one years have elapsed since the principal of said charges or dividends became due and payable, and that no payment on account of the principal sum of said shares, or the interest thereon, has been made within a period of twenty-one years and upwards by the petitioner or by any of his predecessors in title; that no release, acquittance or acknowledgment of the payment of said shares or dividends is of record in the said county; that the said George Dager, Peter Dager, Elizabeth Dager, Adam Mason and Sarah Mason are all the known parties interested in the said recognizances or dividends, if any of them still have any interest therein, and that they and their place of residence if living are unknown to the petitioner; that the principal and interest of the several sums secured by the said recognizances are believed to have been long paid to the parties entitled thereto and that from lapse of time payment of the same is presumed, although no sufficient release or acknowledgment of their payment is of record in said county; and praying the court to decree that the said premises owned by the petitioner shall be released and discharged from the lien and payment of the said recognizances and that all actions, which may hereafter be brought, be barred.

Notice is hereby given to George Dager, Peter Dager, Elizabeth Dager, Adam Mason and Sarah Mason or their respective heirs or legal representatives and to all other parties who may be interested therein, to appear in said court on Monday, March 6, 1905, at 10 o'clock a. m., to answer said petitioner and show cause why the prayer of the petitioner should not be granted and the said land be discharged from the lien

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of said recognizances or charges and all actions hereafter brought thereon be barred.

EDGAR MATTHEWS, Sheriff.

Samuel H. High, Attorney for Petitioner.

Sheriff's Office, Norristown, Pa.,
January 24, 1905.

ORPHANS' COURT OF MONTGOMERY COUNTY, PA. NOTICE OF FILING AND AUDIT OF ACCOUNTS.

Notice is hereby given to heirs, legatees, creditors and all parties in interest that the following accounts have been filed in the office of the Register of Wills or Clerk of Orphans' Court, as the case may be, of said county, on the dates below stated, that said executors, administrators, guardians and trustees have settled their accounts in said office; and that the same will be presented to the Orphans' Court of said county, on Thursday, Feb. 23, 1905, at 10 o'clock a. m., for confirmation, at which time the Honorable William F. Solly, President Judge of said Court, will sit in Court Room No. 3 in the Court House to audit said accounts, hear and pass upon exceptions wherever filed, and make distribution of the balance ascertained to be in the hands of said accountants.

No. 1—JOHNSON—Dec. 27.—First and final account of Charles S. Kinsey, administrator of Josiah Johnson, late of Moreland, dec'd.

No. 2—BAILY—Jan. 5, '05.—First and final account of Frances B. Brown, adm'trix of Joshua G. Baily, late of Norristown, deceased.

No. 3—KIRK—Jan. 6.—First and final account of Montgomery Trust Company, guardian of Joseph Kirk, late a minor.

No. 4—Mathias—Jan. 12.—First and final account of Frank L. Smith, guardian of Norwood D. Mathias, a minor.

No. 5—BLAKE—Jan. 13.—Third and final account of Caroline Blake, adm'trix of the estate of Thomas M. Blake, late of Norristown, dec'd.

No. 6—RICKARDS—Jan. 16.—First and final account of Charles P. Hunt, ex'tor of Margaret Rickards, late of Worcester township, dec'd.

No. 7—BISBING—Jan. 17.—Second account of Hiram Livezey and Susanna Livezey, ex'tors of the estate of Margaret Bisbing, late of Springfield township, deceased.

No. 8—STINSON—Jan. 18.—First and final account of C. Henry Stinson and Robert P. Shick, ex'tors of the last will and testament of Francis G. Stinson, dec'd, who was the executor of the last will and testament of Mary H. Stinson, late of the borough of Norristown, dec'd.

No. 9—HARLEY—Jan. 18.—First and final account of Percival R. Cressman, ex'tor of the last will and testament of Precila Harley, late of Lower Salford, deceased.

No. 10—KNIGHT—Jan. 19.—First and final account of William H. Knight, adm'tor of John J. Knight, late of Plymouth township, deceased.

No. 11—DONEY (nee Kriebel) Jan. 19.—Final account of George F. Stong, guardian of Ida J. Doney (nee Kriebel), minor child of Sarah A. Kriebel, late of Worcester township, dec'd; said minor being now 21 years of age.

LEGAL.

No. 12—KINSELL—Jan. 20.—First and final account of William A. Kulp, guardian of Lydia Kinsell, a minor child of Emeline W. Kinsell, dec'd.

No. 13—DE NEAN—Jan. 20.—First and final account of Josiah S. Pearce, adm'tor of the estate of D. Judge De Nean, late of Lower Merion township, deceased.

No. 14—MESCHTER—Jan. 20.—First and final account of Daniel Meschter, guardian of Wayne Meschter, minor son of Charles Y. Meschter, late of Upper Hanover township, dec'd, said minor having attained his majority.

No. 15—LEEDOM—Jan. 20.—First and final account of Fannie E. Leedom, adm'trix of the estate of Isaac Leedom, late of Norristown, dec'd.

No. 16—BEAN—Jan. 21.—First and final account of Jacob H. Allebach, adm'tor of the estate of Helena Bean, late of Lower Salford township, dec'd.

No. 17—WALTERS—Jan. 21.—First and final account of William Walters, ex'tor of the estate of Hannah Walters, late of Upper Providence township, deceased.

No. 18—CASE—Jan. 21.—First and final account of Ephraim F. Slough, ex'tor of Morris Case, late of Norristown, deceased.

No. 19—ROBERTSON—Jan. 21.—First and final account of Charles U. Robertson, adm'tor of Emma K. Robertson, late of Abington township, dec'd, filed by Norristown Trust Company, attorney in fact.

No. 20—THOMAS—Jan. 21.—First and final account of Joseph Thomas and Mary K. Rittenhouse, ex'tors of the estate of Mary Thomas, late of Norristown, deceased.

No. 21—DUNN—Jan. 21.—First and final account of Harry C. Schuyler and Joseph S. Dunn, ex'tors of the estate of Mary L. Dunn, late of Pottstown, deceased.

No. 22—BEAN—Jan. 21.—First and final account of Garrett H. Bean, Christian H. Bean and John H. Bean, ex'tors of Henry F. Bean, late of Perkiomen, deceased.

No. 23—SUPPLEE—Jan. 21.—The first and final account of the Penn Trust Company, formerly The Albertson Trust and Safe Deposit Company, trustee of Joseph Supplee, late of Norristown, dec'd, appointed by the Orphans Court of Montgomery county, in place of Hiram R. Supplee, discharged; under the will of Elizabeth Supplee, deceased.

HENRY A. GROFF.
Register of Wills and ex-officio Clerk of Orphans' Court.

IRVING P. WANGER. IRVIN P. KNIPE
Notary Public

WANGER & KNIPE,

COUNSELLORS-AT-LAW,

5 E. Airy St., Norristown

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The inspector testified that he removed this pinnacle or petticoat about each day, and removed the cinders from behind the screen; that he always examined the mesh, and reported whether it required any repair.

The spark arrester was of such size and character that it could not be brought into court with facility; and even if it had been presented before the jury, its use could not be easily understood unless it was examined when in place in the engine.

We think it was quite usual to bring spark arresters into court when their construction was less complicated. In Henderson vs. Railroad Co., 144 Pa., 461, the spark arrester was fitted into the engine in the presence of the jury.

When the inspector testified to the work he did in cleaning out the cinders and examining the mesh, we think it was very helpful to the jury to note the construction and determine whether he could see all that he claimed he did see.

Were we in error in striking out the evidence as to fire-throwing upon other nights by engines that were not fully identified? The plaintiff clearly identified the engine against which he charged the fire. It was the engine which passed down the south track shortly before ten o'clock on May 28th, and it pulled the New York milk train on that night.

It is well established that "where the injury complained of is shown to have been caused, or, in the nature of the case, could only have been caused, by sparks from an engine which is known and identified, the evidence should be confined to the condition of that engine, its management and its practical operation. Evidence tending to prove defects in other engines of the company is irrelevant, and should be excluded": Erie Railroad Co. vs. Decker, 78 Pa., 293; Albert & Lahr vs. Northern Central Railway Co., 98 Pa., 316; Henderson vs. Railroad Co., 144 Pa., 461.

But it is claimed that the engine seen on other nights was the engine that passed down on the night of the 28th, because it was the engine that was attached to the milk train. We had no proof that the company uses the same engine each day for the same train, and we know of no presumption that would call for such inference. The witnesses say it looked like the same engine, but they add that all these heavy engines look alike to them.

Again, the witnesses do not fix any particular night when fire

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was thrown other than the night of the 28th. Mr. Knauer saw the engine of the milk train coming down the night of the 29th; he saw it throw fire into the air. But this is not even evidence of negligence "The mere fact that sparks are thrown from the stack of an engine is not therefore evidence in itself of negligence": Henderson vs Railroad Co., 144 Pa., 477. "Even where such sparks cause fires" Philadelphia and Reading Railway Co. vs. Schultz, 93 Pa, 344.

The other witnesses fix no dates for sparks on other nights The defendant showed that this engine that passed down on the night of the 28th passed down on the three preceding nights, but not during the week prior to those three nights. The engineer says, "I ran that run one week. I ran that engine altogether, but I ran that run one week." "Question. Then you did not always have this engine with that? Answer. I always had that engine prior until last June." Under this evidence of the engineer Engine 866 ran each alternate week with the milk train. The witness had the same engine in his daily work, but he made other runs with 866 than this milk train. Engine 866 ran on the 25th, 26th, 27th and 28th of May with the milk train, but it did not pull the milk train during the week preceding these dates. It follows that even if there is a presumption that the same engine draws the same train from day to day, the evidence of fire-throwing on other nights does not establish that 866 was the offending engine. Some witnesses saw fire-throwing on several other nights. Mr. Stover says he probably saw this done five or six times in two weeks. Within the two weeks some engine other than 866 made seven trips, and this other engine may have been observed by the witness and not 866.

The presumption, if any, that the same engine drew the milk train from day to day must give way to the positive testimony that this was not the fact.

But if we were in error in excluding this evidence from the consideration of the jury, it was, in our opinion, a harmless error.

The four witnesses who testified to fire-throwing on other nights were Stover, Sellers, Vaughn and Knauer. Sellers says, "I often seen them throw sparks, but never seen anything like it equal to that night." Vaughn says, "I have seen it pass above Telford coming into the grade there, and as a rule it was throwing sparks of fire." Knauer says, "Within two weeks they throwed the fire that it went down over the railroad bank. I can not say how far, for I

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never had any occasion being out that late at night." He saw it from his sleeping-room. Stover watched the train from the hotel three hundred feet away; at other times he could see it from his home, three squares away. He too saw the engine throwing fire.

Seeing fire thrown into the air by an engine is of little value, in our opinion, as evidence of a defective spark arrester. Unless the cinders are actually seen on the ground, as testified to by Sellers and Vaughn on the night of the fire, the opinion of the witness as to the size of the live sparks becomes a mere guess. We do not believe that any witness can tell the actual size of a cinder by observing the "fire-works" of a stack when viewed from a distance of three squares or from a bed-room window.

All that these witnesses saw as to fire-throwing on other nights consists of live sparks cast into the air and viewed from a distance. Engines will throw sparks that may kindle fires along the roadway, and yet the spark arrester be in good repair. As already stated, fire-throwing is no evidence of negligence.

Whatever the witnesses may have seen on other nights, it is not shown that this fire-throwing did any mischief. When fire-throwing at other times is offered as evidence of negligence, we usually find that fires were kindled along the railroad from the sparks thrown at other times.

Again, evidence of this character is usually given by witnesses who did not see the conduct of the engine on the night of the fire, to corroborate or strengthen the evidence of those who describe the sparks or cinders on the night of the fire. In the case before us all the witnesses who testified to fire-throwing on other nights also gave evidence of the sparks thrown on the night of the fire. If the jury did not believe the witnesses who described the cinders on the night of the fire, we do not see why they should believe them when they added that they saw fire-throwing on other nights. In the one case they testified to facts from seeing the cinders in the yard of the house or on the planking of a bridge, while in the other they give a guess as to what they think they saw.

The evidence at most was only corroborative of the witness who gave it, and of a character so weak that it was not entitled to any material weight. If the verdict were against the evidence we would grant a new trial, whether the reasons are well founded or

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not; but a careful review of the whole case satisfies us that the verdict is not in conflict with the evidence.

The jury may have found that the cause of the fire was chargeable against the boiler-house, just as much so as against the defendant company; or that the evidence of the witnesses who inspected the spark arrester told the truth; or they may have found that they could not tell whether engine No. 866 caused the fire or the engine going north about the same time, which, according to one of the plaintiffs' witnesses, threw fire just the same as the down train; or they may have found that the fire was caused by an engine in proper repair.

Again, the jury may have found that the plaintiffs were guilty of contributory negligence by allowing a door and one or more windows to stand open next to the railroad. In fact, the opening where it is alleged the spark must have entered was without window or door, and the side of the engine passing the building would be less than twenty feet from this opening. With a wind blowing toward the building, it is not surprising that a spark should enter this opening and kindle a fire if it found anything combustible, even if the engine and spark arrester were in proper condition.

The plaintiffs selected a particular engine as the cause of the fire; and yet the evidence shows that three engines passed up the road all at times nearer to the fire than the down train, which must have passed about 9.40 o'clock. The plaintiffs' statement did not call upon the defendant company to defend against any engine other than 866.

The reasons and motion for a new trial are overruled and a new trial is refused.

Orphans Court of Montgomery County.

Estate of Robert Greer, Deceased.

The following paper writing held to be testamentary: "The Model Farm, Gratersford, July 17, 1902. To the Provident Life and Trust Company, Fourth and Chestnut streets, Philadelphia, Pa.: Pay out of my estate the sum of $500 to Kate Detwiler for her kindness to me. Robert Greer."

The delivery of a testamentary paper to the beneficiary, no present interest passing, does not make it irrevocable.

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Greer's Estate.

E. G. Hamersly, Esq., for accountant.

Hillegass & Larzelere, Esqs., for Mrs. Kate Detwiler.

Opinion of the court by SOLLY, P. J., December 15, 1904.

Robert Greer, a resident of Montgomery county, died therein on September 17, 1903, testate. His will, dated January 8, 1901, was duly admitted to probate by the register of wills of Montgomery county and letters testamentary granted to the Provident Life and Trust Company, named as executor. The account of the executor was filed in the office of the register of wills on October 15, 1904. At the audit Mrs. Kate Detwiler, through her counsel, Hillegass & Larzelere, presented a claim for $500, based upon an instrument of writing of which the following is a copy:

"The Model Farm,
"Gratersford, July 17, 1902.

"To the Provident Life and Trust Company, Fourth and Chestnut streets, Philadelphia, Pa.:

"Pay out of my estate the sum of $500 to Kate Detwiler for her kindness to me. [Signed] Robert Greer.

"July 17, 1902."

This is the only matter in the estate over which there is any controversy. To the mind of the court, the question would have come up more regularly for adjudication if the instrument had been offered for probate and an appeal taken from the decree of the register of wills either admitting or refusing to admit it as a codicil to decedent's will. Counsel for Mrs. Detwiler seem to be uncertain of its legal effect, whether it is a testamentary disposition or a due bill for money owing their client, because they have asked the court to suspend final distribution of the estate, if the conclusion is reached that the instrument is a testamentary paper, until they have had it duly admitted to probate. At the hearing, however, they went on and treated it as an obligation for the payment of $500 at the death of its maker. They offered evidence to show the consideration, and they also called one or two witnesses to testify to declarations made to them by the decedent in his life-time, that it had been given to Mrs. Detwiler for services rendered to him. But they were by no means sure of their ground, and hence requested to be permitted to probate the paper, and claim as legatee, if the claim should be rejected as a debt of the decedent. Counsel for the residuary legatees

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objected to the paper either as a testamentary writing or as a due bill evidencing a debt. The court, therefore, is called upon to construe this paper, and to say what is its legal effect.

In the first place, it is admitted to be in the handwriting of the decedent, and signed by him. It is also admitted that it was delivered to Mrs. Detwiler on or about the time of its date. She has since had it in her possession. The decedent told one of the witnesses, Mr. Semple, that he had given it to her; or, to use the language of the witness, "He (Greer) said, 'I have given her (Mrs. Detwiler) a paper to get $500 when I die.'" This declaration is very significant of the intention of the decedent and how he regarded and treated the paper.

No suspicious circumstances surround the making of it; at least, none have been made to appear. There are no allegations of fraud, collusion or duress attending its execution and delivery. Upon its face there is no acknowledgment of a debt owing Mrs. Detwiler; no promise to pay money. It is a plain direction or command to pay $500 out of the decedent's estate. It is addressed to the Provident Life and Trust Company, the executor named in decedent's will, which had been executed on January 8, 1901, which will the Company had in its possession. There is no evidence that the Company had any money in hand presently payable to Greer; and the reason for addressing the Company, therefore, must have been because it was executor, and the money was to be paid out of the estate—that is, after the death of Greer. To his blood Mrs. Detwiler was a stranger. The reason for the gratuity is stated in the paper to be for her kindness. This is quite sufficient to support a legacy.

There is nothing to show upon the face of this paper that it evidences a debt. It is not a due bill or an obligation of any kind. There is no acknowledgment of a debt, no promise to pay any money. As long as he lived, the decedent was not liable to pay anything. Mrs. Detwiler had no present interest in it. It was not irrevocable; on the contrary, it could have been revoked any time by Greer. It, therefore, lacks all the elements of an obligation, while it has every element of a testamentary paper. It is dated, and directs the payment of a sum of money out of his estate—that is, at his death, to Mrs. Detwiler, and is signed at the end thereof. I am of the opinion that it is a testamentary writing in the nature of a codicil to the will of the decedent, and that upon being duly admitted

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to probate Mrs. Detwiler is entitled as legatee to the sum of money directed to be paid to her out of the estate. The authorities in this state upon the subject of what are testamentary writings are numerous, and I think quite uniform.

An instrument may be in any form, and if the clear purpose is that it shall not take effect as to the disposition of property until after the death of the maker, it is a will: Rose vs. Quick, 30 Pa., 225; Turner vs. Scott, 51 Pa., 126; Frew vs. Clarke, 80 Pa., 170; Schad's Appeal, 88 Pa., 111; Fosselman vs. Elder, 98 Pa., 159; Wilson vs. Van Leer, 103 Pa., 600; Sullivan's Estate, 130 Pa., 342; Knox's Estate, 131 Pa., 220; Tozer vs. Jackson, 164 Pa., 373; Harrison's Estate, 196 Pa., 576; Megary's Estate, 206 Pa., 264.

The doctrine of the cases is that whatever the form of the instrument, if it vests no present interest, but only appoints what is to be done after the death of the maker, it is testamentary: Turner vs. Scott, *supra*.

In Frew vs. Clarke, *supra*, Mr. Justice Mercur, in the course of the opinion, said, "A will is defined to be the legal declaration of a man's intentions which he wills to be performed after his death: 2 Black. Comm., 500; Bouv. Law Dict.; 1 Jarman on Wills, 11. An instrument in any form, whether a deed poll or indenture, if the obvious purpose is not to take place until after the death of the person making it, shall operate as a will: Habergham vs. Vincent, 2 Ves. Jr., 204. It may be by an endorsement on a note: Hunt vs. Hunt, 4 N. H., 34; or by letter: Morrell vs. Dickey, 1 Johns Chan., 153. Whatever be the form of the instrument, if it vests no present interest, but only directs what is to be done after the death of the maker, it is testamentary: Turner vs. Scott, 1 P. F. S., 126. The essence of the definition is that it is a disposition to take effect after death: Redfield on Wills, 5; Turner vs. Scott, *supra*. Nor does it matter that the person intended to make a note instead of a will. If he used language which the law holds testamentary, his intention is to be gathered from the legal import of the words he employed: Ib. No form of words is necessary to make a valid will. The form of the instrument is immaterial, if the substance is testamentary: Paterson vs. English, 21 P. F. S., 458. See also Rose vs. Quick, 6 Casey, 225; Frederick's Appeal, 2 P. F. S., 338."

The instrument of writing which gave rise to the controversy in Frew vs. Clarke, *supra*, was in substance very much like the paper

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in this case. It was an order, and directed by McCully to his administrator or executor, "in case of my death," to pay to Clarke $75,000 "as a token of my regard for him, and to commemorate the long friendship existing between us." It was dated, and signed and sealed by McCully. A majority of the Supreme Court were of the opinion that it was a testamentary writing. Justice Mercur, who wrote the opinion of the court, said: "It contains no admission of indebtedness. It furnishes no evidence of a debt. It contains no promise to pay. It vested no present interest. It was not to take effect until after the death of McCully. In the meantime he could revoke it at his pleasure. It, therefore, possessed all the essential characteristics of a will, and was undoubtedly testamentary in its character." Justices Sharswood and Paxson dissented from the judgment of the court, and the latter wrote the opinion of dissent which appears in the report of the case in 3 W. N. C., 497, in which it is stated that the writing by reason of its delivery became irrevocable and an obligation for the payment of money. But the case has never been overruled, and is not only cited but approved by Mr. Justice Paxson in the course of his opinion in the case of Wilson vs. Van Leer, 103 Pa., 600. There is no material difference between the paper in Frew vs. Clarke and the one in this case, and we could well stop here.

But there seems to be considerable stress laid on the fact that Greer delivered the paper to Mrs. Detwiler, and hence made it irrevocable. That this is not corect as a matter of law is abundantly shown by the authorities. Frew vs. Clarke holds it to be revocable at the pleasure of the maker. In Wilson vs. Van Leer, *supra*, the court said: "It was urged, however, that inasmuch as the paper was delivered during the life-time of the testator, it was irrevocable, and in the nature of a contract or obligation. . . . But in Frew vs. Clarke the paper had been delivered precisely as in this case. Frew vs. Clarke was strongly contested in the court below and in this court. It has never been supposed that the delivery of a testamentary paper to the person beneficially interested, where no present passes, destroyed the testator's power of revocation. It is still ambulatory; to take effect only after death, in case it is not revoked." It is needless to cite other cases in point. The latest I have found is Megary's Estate, 206 Pa., 260.

In that case the paper was addressed "To whom it may con-

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cern." The court said: "Omitting from the second paragraph the operative and disposing part of the instrument, the words of which may be treated as surplusage, the paragraph reads as follows: 'I, Sarah Megary, desire and so affirm that my said step-daughter shall receive out of my estate a sum of money or its equivalent that shall aggregate two thousand dollars. . . .' It expresses no intention to assume a personal liability. It is a command to the parties to whom it is addressed, who are evidently the persons interested in the settlement and distribution of her estate after her death, that the beneficiary named in the instrument shall at that time receive the money out of the estate. . . . We think it clear from the context that the term 'estate' refers to the property that the maker of the paper should possess at the time of her death. The entire language of the clause in question excludes the idea of an intention to create a present indebtednes or to assume any liability whatever."

The fact appeared that the paper was delivered to Mrs. Ege, and it was contended that it was an obligation; that she retained possession of it, and that it was therefore irrevocable, and hence not testamentary. But the court said the fact of delivery and that she she had possession of it could not destroy its revocability.

Bentley vs. Lamb, 112 Pa., 481, has been called to our attention by Mrs. Detwiler's counsel as being closely analogous to this one. That case, however, is clearly distinguishable. The paper was given in pursuance of a written agreement of the decedent that he would give his employee a due bill for $3,000, payable after his death, as compensation for services rendered. The instrument in terms is a due bill, payable one year after decedent's death by his executors or administrators out of his estate. It was delivered to the payee, who after the death of the maker brought assumpsit against his executors to recover the amount of it. A verdict was directed for the plaintiff, which was affirmed by the Supreme Court, who held the instrument to be an obligation founded upon a good consideration.

Mrs. Detwiler is entitled to receive five hundred dollars out of this estate; but it can not be awarded to her unless the instrument of writing we have been considering is first admitted to probate as a codicil. Final distribution of the fund in the accountant's hands will be postponed until after that is done. But the creditors should not be deprived of their money in the meantime, and awards will now

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be made to them. The balance, after satisfying these awards, will be distributed in a supplemental schedule. The account will be confirmed.

Court of Common Pleas of Montgomery County.

IN EQUITY.

TOWNSEND HAINES ET AL. VS. PHILADELPHIA AND READING RAILWAY COMPANY.

Under the act of March 17, 1869, P. L. 12, the widening power of a railroad company is not exhausted at a given point by prior takings.

When a railroad company condemns land for purposes which appear to be necessary, the court will not interfere with the judgment of the company.

A railroad company can condemn land, although by so doing a land-owner is prevented from having access to a canal or river.

A land-owner is not entitled to a grade crossing to enable him to get from his land to a canal or river. If injured, his remedy is in damages.

APPLICATION for injunction. No. 3, December T., 1904.

J. A. Strassburger and *F. G. Hobson, Esqs.*, for plaintiffs.

Montg. Evans, Esq., for defendant.

Opinion of the court by WEAND, J., January 30, 1905.

HISTORY OF THE CASE.

Townsend Haines, one of the plaintiffs, being the owner of a tract of land containing fifty and thirty-one one-hundredths acres of land, situate in Upper Merion township, Montgomery county, on September 17, 1904, entered into articles of agreement for the sale of the same to Mary W. Lee, the other plaintiff, on or before April 1, 1905; and the said Mary W. Lee has paid, on account of the purchase money, two hundred and fifty dollars.

On November 2, 1904, to December Term, 1904, No. 39, in the Court of Common Pleas of Montgomery county, the Philadelphia and Reading Railway Company filed its bond for the purpose of condemning and taking under the right of eminent domain a certain portion of said land so agreed to be conveyed to said Mary W. Lee. The condemnation bond has not yet been approved. In this pro-

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ceeding the plaintiffs contest the right of the defendant to take said land, and ask for a restraining order.

FINDINGS OF FACT.

1. Townsend Haines is the legal owner and Mary W. Lee the equitable owner of the premises in dispute.

2. That the farm is divided into two parts by the tracks and right of way of the defendant company. The larger portion of the farm lies to the south of said tracks and right of way; and a small portion, containing about two and six-tenths acres of land, lies to the north of said tracks and right of way, between the right of way of said defendant company and the river Schuylkill. This latter part is that proposed to be taken by the defendant company.

3. Along the river front of this land the Schuylkill Navigation Company's canal is in the river, and its tow-path is between the plaintiffs' land and the river.

4. For many years there has existed a grade crossing across the tracks of the railroad company, permitting access to and from one part of the said farm to the other and from the south side of the farm to the river.

5. That Mary W. Lee purchased the farm for the express purpose of a country-seat, being influenced to a large extent by the fact that it had a river front, to which access could be had by reason of the grade crossing.

6. That fronting on the river there exists a wall used to support the tow-path of the Navigation Company, and which at one time had been and still can be used as a wharf for the loading and unloading of vessels suitable for use on said river.

7. The said railway company has erected and is constructing a large storage place for coal about a mile below these premises, and for that purpose requires additional trackage to accommodate its business in connection therewith.

8. This taking by defendant company is for necessary purposes, and is not done for the mere purpose of destroying or obviating the necessity of a grade crossing.

9. If the defendant's action is lawful, there is no necessity for a grade crossing, as complainants will then not have land on both sides of the railroad.

10. That within two years said defendant company has con-

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demned and appropriated for similar use two small portions of this same farm, prior to Mrs. Lee's agreement of purchase.

CONCLUSIONS OF LAW.

1. That defendant's taking is lawful, and can not be contested because of prior takings.

2. As complainants will have no land or property to which they have occasion for a grade crossing, the fact that their present one will be eliminated can not defeat defendant's action.

3. The fact that complainants will be shut off from the tow-path of the canal and from the river may be the subject of damages, but will not warrant an injunction.

4. That complainant's bill should be dismissed with costs.

ARGUMENT.

In Sutton vs. Pennsylvania Railroad Co., 19 Montg., 111, Judge Swartz ruled that "the widening power under the act of March 17, 1869, P. L. 12, is not exhausted at a given point along the line of the road-bed by a single taking of land; the widening at that point may be repeated whenever the safety of persons and property and the facilities for the transportation of traffic require such action." We adhere to this opinion, which we think rules this case.

In Dryden vs. Pittsburg et al. Railroad Co., 208 Pa., 316, it was held that the act "is not open to the objection that the extent of the right to take is indefinite because not limited to a specific width," and further held that under its provisions a dwelling house might be appropriated. The Legislature evidently had in view the increasing business of railroad companies and the absolute necessity for greater power in condemning of land in the interest of the public. The very fact of a taking at a particular point may so increase business there as to absolutely require greater facilities and hence additional land.

The contention of complainants that this taking is not necessary is not supported by the testimony. The erection of the storage plant requires greater trackage to facilitate the moving of the trains and to relieve the congestion at that point. Of this necessity the company is the judge; and if its action is arbitrary, or shown to be without reason, it can be restrained.

In Pittsburg, Fort Wayne and Chicago Railway vs. Peet, 152

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Pa., 488, the court said, "When a railroad company condemns land it is of necessity the judge of how much is required for its use, and this question should not be submitted to the jury in a subsequent action of ejectment against the railroad company." The evidence in this case will not warrant the court in holding that the judgment of the company should be overruled.

The abolition of the grade crossing is not a proper element in the case. If the taking is lawful, the complainants do not require a crossing to any part of their remaining land; but even if they are entitled to such crossing, the question of maintaining the old or the giving of a new one must be settled in another form of action.

In Dimmick et al. vs. The Delaware, Lackawanna and Western Railroad Co., 180 Pa., 468, the law was stated to be that "where a railroad company settles with a land owner for its right of way by paying him damages, and further agrees to put down a farm crossing, the remedy of the land-owner against the railroad company to compel the latter to put down the farm crossing in accordance with its agreement, is not obtained by bill in equity but by proceeding under the general railroad law of February 19, 1849, Sec. 12 P. L. 84."

Neither do we regard the fact that complainants will be shut off from the canal and river as having any bearing on this case. They have no right on the tow-path and hence would be trespassers, and therefore can not complain because they can not use it. If they are injured in this respect their remedy is in a suit for damages. Being shut off from the river is no greater than being shut off from a public road, and we are not aware that a railroad company can be enjoined from condemning farm land adjoining a public road.

In Kenny vs. Pittsburg, &c., Railroad, 208 Pa., 30, a land-owner conveyed real estate to the railroad company, reserving in his conveyance a ferry-landing and private right of way over and across the land conveyed, the work of constructing the crossing to be done by the railroad company. Subsequently the company condemned the ferry-landing and the right of way reserved, and its action was sustained.

In the course of the opinion the court said: "It seems to us the reservation in this case is not different from any other reservation. It was admitted in the argument that the company might have taken the ferry-landing, and also have deprived the land-owner of

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a road to the river, had it proceeded with its original condemnation proceedings."

The complainants here have no special rights in the canal or in the river different from what they have in an ordinary public road. If every land-owner who is cut off from a river or canal is entitled to a crossing, it would be a great burden on the railroad company and dangerous to the public.

The abolishing of grade crossings is being gradually accomplished by law or because of expediency, and they certainly are not to be favored where the right to have them is not made clear.

The authorities cited by complainants have no application to the question here involved. If the Schuylkill Navigation Company was complaining, a different question might arise; but an infringement of their rights can not be set up by a stranger.

In Hespenhaide et al. vs. King, Pittsburg Leg. J. N. S., 31, O. S., 48, page 242, the plaintiffs owned land on both sides of the railroad, which is the distinguishing feature in the case.

And now, January 30, 1905, a decree *nisi* is directed to be entered dismissing plaintiffs' bill with costs; and unless exceptions are filed within the time limited by the equity rules, the prothonotary will enter a final decree accordingly.

ISAAC F. MARCH AND EMMA M. BRINDLEY VS. JOSEPH C. LUKENS AND EMILY IRENE YERKES.

A common law arbitration removes the case from the court: the arbitrators, being judges of the parties own choosing, are judges of the law and the facts; and their finding is conclusive, unless set aside for fraud, misconduct or partiality.

The award can not be attacked collaterally for mistake of law or fact. In such case the remedy, if any exists, is by bill in equity to reform or set aside the award.

MOTION to take off non-suit. No. 121, March T., 1903.

John W. Bickel and *Wanger & Knipe, Esqs.*, for plaintiff.

Larzelere, Gibson & Fox, Esqs., for defendant.

Opinion of the court by WEAND, J., February 6, 1905.

Plaintiffs, as owners of a quarry property, brought suit against defendants to March Term, 1902, to recover damages which it was

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alleged they had sustained at the hands of defendants. Under date of December 9, 1902, the parties entered into an agreement, of which the following is a copy:

"Whereas, suit was brought by Isaac F. March and Emma M. Brindley against Joseph C. Lukens and Emily Irene Yerkes, trading under the firm name of Lukens & Yerkes, in the Court of Common Pleas of Montgomery county, No. 157, March Term, 1902;

"And whereas, under the terms of contract under which defendants worked the quarry of plaintiffs, this clause is contained: 'In the event of the lessors complaining of the unworkmanlike manner in which the quarry is being operated to affect its future injury, they shall notify the lessee by ten days written notice; and if the matter is not corrected, the lessee and lessor shall each select a competent person, who shall select a third person, to examine the matter, and their decision shall be final; and the lessor and lessee agree to comply with the finding of a majority of the said arbitrators, the cost of which shall be borne by the party in error';

"And whereas, it is conceded that not only matters strictly within the term of said agreement to arbitrate are embraced in the written statement of claim involved in the suit, but that other matters are therein embraced and involved;

"And whereas, it is the desire of the parties to still adjust and settle their differences by the mode of arbitration provided for in said article of agreement,

"Now, therefore, it is mutually agreed as follows, that the arbitrators shall be chosen as provided in said agreement, to wit: One by the plaintiffs and another by the defendants, who shall select a third, and that all matters embraced and complained of in the statement of plaintiffs' claim, filed in the suit aforesaid, shall be embraced within the terms of said arbitration, as well as those matters strictly referred to and mentioned in the lease, and that the award of said arbitrators shall be final and conclusive between the parties.

"It is further agreed that the present suit shall be discontinued by the plaintiffs, and the costs paid; but the record costs paid, as well as the reasonable fees of witnesses in attendance upon two days of court, shall be embraced and considered in the award and taxed against the losing party. The costs of the arbitration likewise shall be taxed to and paid by the losing party; and the party against whom the award is made shall pay said award and costs within thirty

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days after notice and a filing of a copy of said award with each of the parties.

"Witness the hands and seals of the parties this 9th day of December, A. D. 1902.

"Signed, sealed and delivered	March & Brindley,	[Seal.]
in the presence of	Per Isaac F. March.	[Seal.]
"John W. Rutan.	Lukens & Yerkes,	[Seal.]
"Gilbert R. Fox.	Per Jos. C. Lukens."	[Seal.]

Arbitrators were chosen in accordance with said agreement, and plaintiffs discontinued their suit.

It will be observed that this was now a common law arbitration; and that by the terms of the contract under which the quarry was operated, and also under the terms of the agreement, "the decision shall be final" in the one case, and "the award of said arbitrators shall be final and conclusive between the parties" in the other.

The arbitrators met and heard the parties and their witnesses. Plaintiff in this suit testified that both he and his witnesses were before the arbitrators, and that he submitted every item and claim in this suit to the three men chosen.

The award was unanimous and in the following form:

"The arbitrators in the case of March & Brindley vs. Lukens & Yerkes find in our conclusion that Lukens & Yerkes were not at any time tenants of March & Brindley under the provisions of the lease made between March & Brindley and William J. McEvoy.

"In consequence of this decision we find that Lukens & Yerkes are not liable to March & Brindley for any damages."

Within thirty days after the filing of said award the plaintiffs gave written notice to defendants that said award was invalid in law, and that suit would again be brought; and the present proceeding is the result.

The contention of plaintiffs in this suit is that said award was not binding because the arbitrators "failed to consider the questions submitted to them, but instead went out of their way to find that no tenancy existed between plaintiffs as landlords and defendants as tenants."

At the conclusion of plaintiffs' testimony we directed a compulsory non-suit upon two grounds:

1. That the award could not be attacked collaterally; and,

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2. That the award was not invalid merely because the arbitrators had assigned a reason for their conclusion, which particular reason might not be a proper one.

Kyd on Awards says, page 327: "When the submission is by the mere act of the parties, then in order to be relieved against the award on account of any extrinsic circumstances the defendant can not make these a defence to the action on the award, or on the submission bond; he can not give in evidence anything to impeach the conduct of the arbitrators. The award is a determination of judges chosen chosen by the act of the party himself, and nothing extrinsic to that judgment can be offered in evidence to overturn it."

The proper practice in England and this country appears to be by a bill in equity if the courts can entertain jurisdiction at all in cases where no fraud, corruption or misconduct is alleged.

In McManus vs. McCulloch, 6 Watts, 357, it was held: "The submission being under the authority of the common law here, the arbitrator is to be considered as a judge or tribunal of the parties own choosing; and his decision or judgment can not be set aside unless for partiality or corruption, which will not be presumed on slight grounds but must be clearly shown. Hence an award being considered in the nature of a *judgment*, is in this respect different from an *award* which will not bar an action founded on the original cause, without being executed, though the former will: Allen vs. Harris, 1 Lord Raym, 122," citing Bailey vs. Lechmere, 1. Esp. Ca., 377, to same effect.

In Speer vs. Bidwell, 44 Pa., 23, it was ruled: "If an award at common law follows the submission, it is binding, though there be no express agreement to that effect; and it is not to be set aside for mistake of the arbitrators, in law or fact, especially where none appears on the face of the award."

In Liverpool, &c., Insurance Co. vs. Goehring, 99 Pa., 13, fraud and misconduct were alleged against the award, but the court held: "Then again the mistake complained of, if mistake there was, which is doubtful, was of a character so insignificant as to be unworthy of attention. Even were it much more important than it is alleged to be, it could not be used to set aside the award."

West Jersey Railroad Co. vs. Thomas et al., 21 N. J. Eq., 205, was a proceeding in equity. "This court has jurisdiction over awards; the jurisdiction is ancient and well established. . . .

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But no court will review and correct an award; the only power is to set it aside for corruption, or misconduct in the arbitrators, or a plain mistake of law or fact. And if arbitrators decide against law, not by mistake, but of purpose, with the intention of making a just award, when the strict principles of law seem to them to work injustice, their award will not be disturbed."

In Goodwine vs Miller, 32 Indiana, 419, it was ruled: "In Hays vs. Miller, 12 Ind., 187, it is said this was a submission where no cause was pending, and there was no agreement to make the submission a rule of court. The reference, therefore, was at common law, and the mere act of the parties. And there are various decisions to the effect that in such case, in an action to enforce the award, it is no ground of objection that it is against law: Mitchell vs. Bush, 7 Con., 185; Jackson vs. Ambler, 14 Johns, 96; Cranston vs. Henny, Executors, 9 Id., 212; Bigelow vs. Newell, 10 Pick., 348. These authorities proceed upon the ground that if judges chosen by the parties erroneously decide a question of law, the court will abide the decision."

In American and English Encyclopedia of Law, 2d ed., Vol. 2, page 661, it is said: "But in both countries he (the arbitrator) is the ultimate judge of the admissibility, weight and relevancy of the evidence or the competency of the witnesses; and once he has passed on these questions his decision is not open to review, nor if, intending to decide rightly, he makes a mistake will the award be set aside for that reason."

In Viele vs. Troy and Boston Railroad Co., 21 Barb., 381, it was said: "Arbitrators are judges of the parties choosing, and their determination is generally final and conclusive. Their award may be vitiated in a court of equity for partiality or corruption in either of them; but it is no ground for setting it aside that they erred in receiving impertinent and incompetent evidence."

"An award made in good faith, although erroneous, is conclusive": Winship vs. Jewett, 1 Barb., 173.

Morse on Arbitration and Award, speaking of conclusiveness of the arbitrator's decision both in law and fact says: "The ablest discussion of the subject is to be found in the opinion delivered by Chief Justice Shaw in the famous cause of the Boston Water Power Co. vs. Gray, 6 Metc. (Mass.), 131. The language of the Judge is: 'In general, arbitrators have full power to decide upon questions of

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law and fact which directly or incidentally arise in considering and deciding the questions embraced in the submission. When not limited by the terms of the submission they have authority to decide questions of law necessary to the decision of the matter submitted, because they are judges of the parties own choosing. Their decisions of matters of fact and law, thus acting within the scope of their authority, are conclusive, upon the same principle that a final judgment of a court of last resort is conclusive, which is that the party against whom it is rendered can no longer be heard to question it. It is within the principle of *res judicata;* it is the final judgment for that case and between these parties. It is amongst the rudiments of the law that a party can not, when a judgment is relied on to support or to bar an action, avoid the effect of it by proving, even if he could prove to perfect demonstration, that there was a mistake of the facts or of the law.'"

Morse further says: "In many cases arbitrators have been declared to be the supreme and final judges of both the law and the fact. Their decision can not be appealed from, revised or annulled by reason of any mistake which they may have fallen into."

We cite these decisions as applicable in this state to common law awards.

We conceive that if the party who thinks himself aggrieved has a remedy, it is to have the award set aside.

"But a defendant in an action on an award can not support a plea of no award by showing that though an award has been made pursuant to the submission, yet this award is in fact bad or void. For example, he will fail on such an issue if he rely on the fact that an award, made in accordance with the submission, is bad because it shows on its face that the arbitrator has exceeded the scope of his authority. The general rule is that such matters can not be pleaded in defence to a suit at law on the award. They may, however, constitute a proper cause for a bill in equity, which may pray that the award be declared void": Morse on Arbitration and Award, pages 594, 595. But the author confines this remedy to cases of misconduct, fraud or mistake.

If it be conceded, however, that the arbitrators assigned an improper reason for their judgment, it does not follow that their conclusion might not be correct. It is not unusual for courts to be sustained, although giving a wrong reason for their judgment.

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Morse on Arbitration and Award, page 562, says: "The award of arbitrators, once made, is a complete and finished instrument. It must be construed, so far as regards its legal force and signification, without external assistance. Neither affidavits nor testimony of the arbitrator or referee can be received to alter, correct, or even explain its meaning." We are not called upon to decide whether such would be the law when the purpose is to show that the arbitrators have exceeded their powers.

The plaintiffs, against the objection of defendants, took the testimony of the arbitrators to explain upon what grounds they based their award. Mr. Koch, plaintiffs' arbitrator, says, page 6 of deposition, in answer to the question, "Now, Mr. Koch, the evidence as to whether Lukens & Yerkes were tenants of March & Brindley was entirely separated from the evidence by Mr. March of the damage which he had sustained by certain acts complained of in the suit and arbitration, was it not?" Answer. "I do not see that it was separate, from the simple fact that we had the lease and checks and other papers there to show that they were tenants, while there was evidence they were not tenants. I do not see it is different. It was part of the testimony."

According to plaintiffs' own arbitrator, therefore, this question of tenancy was introduced by plaintiffs themselves; and this being so, they can not complain of the action of the arbitrators in considering it. It also appears that the merits of the entire case was considered by the arbitrators, who unfortunately gave a reason for their conclusion.

And now, February 6, 1905, the motion to take off the nonsuit is overruled.

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Assigned Estate of George S. Fister.

A made an assignment for the benefit of creditors and appointed B an assignee. B filed his account and had it referred to an auditor to make distribution.

A year after the assignment, and after the auditor had met several times, A was, on his own petition, declared a voluntary bankrupt, and B was appointed trustee. B as trustee then claimed the iund in his own hands as assignee. His petition to have the fund paid to him was refused.

Petition of trustee in bankruptcy to have possession of funds in hands of the assignees for the benefit of creditors.

William S. Acuff, Esq., for assignees.

Larzelere, Gibson & Fox, Esqs., for estate.

Opinion of the court by Weand, J., January 9, 1905.

On the 3d day of February, 1903, George S. Fister made a voluntary deed of assignment for the benefit of creditors to Alfred S. Miller and John J. Houghton, which deed of assignment was duly recorded in the office for recording of deeds, at Norristown, Montgomery county, on the 4th day of February, 1903. No creditor has objected to said assignment, nor has it been attacked in any manner.

The assignees have realized a large amount of money by the conversion of the real and personal estate of the assignor, and filed their account, upon which the court has appointed an auditor to make distribution; and several meetings for that purpose have been held before the auditor.

On June 2, 1904, the said George S. Fister presented a petition in voluntary bankruptcy in the District Court of the United States for the Eastern District of Pennsylvania, and he was subsequently adjudged a bankrupt.

Alfred S. Miller, one of above named assignees, was appointed trustee of the bankrupt's estate, and now asks this court to decree that the funds in the hands of the assignees for benefit of creditors shall be paid to him by virtue of his appointment as trustee in bankruptcy.

We fail to see any merit in this application. The fund is in the hands of the law for the benefit of the creditors of said Fister; and as the creditors are the same, and the course of distribution the same, whether the estate is distributed in the state or United States court, there should be some good reason shown why we, at this time, when an auditor is engaged in determining the rights of cred-

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itors, should delay the matter by transferring the proceeding to another court when no possible good can be accomplished by such action.

In Weinmann & Co.'s Estate, Lea's Appeal, 164 Pa., 405, it was held: "It is well settled in Pennsylvania that by the assignment the creditors become equitable owners of the property embraced in it to the extent of the assignor's indebtedness to them. Their rights are fixed as of the date of the assignment, and their ownership of the property is in the proportion that their respective debts bear to the whole indebtedness."

As the creditors, therefore, are equitable owners of this fund, under an assignment not attacked and not in violation of the Federal bankruptcy act, and a court of competent jurisdiction having decreed distribution by one of its own officers, to grant this petition would be a wrong to the creditors.

When Fister assigned his property he parted with his ownership of it until his debts were paid. He could not afterward have conveyed or disposed of it without the consent of those for whose benefit it was assigned, and he can not by his voluntary act of bankruptcy a year afterward divert the property or fund into another channel. It was no longer his property, and therefore the trustee in bankruptcy could not acquire title to that which Fister himself did not have, the assignment not being void or voidable under the United States bankruptcy act.

In Meyer vs. Hellman, 91 U. S., 496, Mr. Justice Field said: "The great object of the bankruptcy act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt. For that purpose it sets aside all transactions within a prescribed period, previous to the petition in bankruptcy, defeating or tending to defeat such distribution. . . . These periods constitute the limit within which the transaction will be examined and annulled, if conflicting with the provisions of the bankruptcy act. Transactions anterior to those periods are presumed to have been acquiesced in by the creditors. There is sound policy in preserving a limitation of this kind. . . . The assignment in this case was not a proceeding, as already said, in hostility to the creditors but for their benefit. It was not therefore void as against them, or even voidable. Executed six months before the petition

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in bankruptcy was filed, it is to the assignee in bankruptcy a closed proceeding."

In this case no fraud is alleged; and as the assignment was executed and delivered more than a year before the petition in bankruptcy was filed, it did not of itself constitute an act of bankruptcy.

The decision of the Superior Court in Potts vs. Smith Manufacturing Co., 25 Superior Ct., 206, has no application. This assignment was not under the act of June 4, 1901, P. L. 404, nor is it necessary to invoke any of the provisions of that act to sustain it. It was made under the several acts of the Legislature which conferred the power of a debtor to transfer his property to an assignee for distribution amongst creditors in proportion to their claims. The object of the bankruptcy act was either to enable an honest debtor to get rid of his debts, or to compel him to assign his property for the benefit of his creditors; but it did not prohibit a debtor from voluntarily surrendering his property to pay his debts to the extent of his assets, leaving it optional with his creditors to question the *bona fides* of the transaction by having him declared a bankrupt or to accept his act in making the assignment. In this case the assignor and the creditors stand by the assignment, and the law gives the trustee in bankruptcy no claim on the estate by reason of the lapse of time.

The trustee is also one of the assignees. When he accepted the assignment and assumed his duty as assignee, he recognized the validity of the assignor's act. When he filed his account in this court, he admitted our jurisdiction to distribute the fund; but he now asks us to say that he shall pay over to himself that for which in either capacity he would only hold for the interest of creditors. It is scarcely to their interest to thus cause delay and expense for no good reason assigned.

In Climax Road Machine Co. vs. Sheesley, 30 C. C. R., 201, in speaking of the effect the Federal bankruptcy act has on the state insolvent laws, Judge Weiss held that both the enacting and repealing features of the act of Assembly (act of 1901) are inoperative so far as they are touched by the act of Congress. The latter act relates to insolvents, and constitutes an assignment for the benefit of creditors an act of bankruptcy. It follows that the repealing clauses of the act of Assembly (1901) are suspended, and that the

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acts sought to be repealed are in force so long at least as the act itself is suspended. And this view of the law sustains our contention as not being in conflict with the decision of the Superior Court in Potts vs. Smith Manufacturing Co., *supra*. For the distinction between the effect of the act of 1901 and the various prior acts governing assignments for the benefit of creditors, see the decision of Judge Fields in Meyer vs. Hellman, *supra*.

And now, January 9, 1905, the petition is refused.

Lavina H. Carver vs. The Burgess and Town Council of the Borough of Norristown.

Board of Health—When it must supply subsistence, in case of quarantine—Boarders in a quarantined house.

Where a house is quarantined by a board of health, it is the duty of the board to provide subsistence for the family where a necessity arises by reason of the confinement or restraint; but if the householder has property, money or credit to provide all needed supplies, then all that can be demanded of the board of health is a reasonable opportunity to send out and purchase such supplies.

Where the householder keeps a boarding-house, and the board of health promises to furnish the needed supplies for the boarders, the keeper of the boarding-house can supply the needs of the boarders without subjecting herself to the inference that she furnished the supplies as a gratuity; but if the boarders are able to pay for the food and maintenance, they can not escape liability therefor.

Demurrer to the sufficiency of the plaintiff's statement. No. 170, June T., 1904.

E. F. Slough, Esq., for plaintiff.

Irvin P. Knipe, Esq., for defendant.

Opinion of the court by Swartz, P. J., February 20, 1905.

The plaintiff's statement alleges that she kept a boarding-house in the borough of Norristown. One of the inmates was attacked with small-pox, and the house was quarantined. The inmates of the house were plaintiff's family, consisting of five persons and a servant. Some ten boarders were also quarantined within the house.

The statement sets out that the health officer of the board of health, upon application to him, promised to maintain and support the family and boarders during their confinement under quarantine.

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She alleges further that she was poor and dependent upon the payment from her boarders for her maintenance and living; that the boarders were also poor and dependent upon their daily wages to pay their board. She provided for all the inmates of the house during their confinement. She declares that the board of health failed to pay for the support that she provided during the quarantine.

She presents an itemized bill for groceries, meats and provisions used in the house. She also claims for coal, rent, and clothing burned.

She alleges that these bills "were contracted and paid by her" during the two weeks that the quarantine continued.

That she had property, money or credit to provide subsistence for herself and family is manifest, for she was able, according to her statement, to supply not only her own family but some ten boarders in addition. She had the means of support at the time of the quarantine. She was not in want,—the necessities of her case did not require help from the borough. A board of health is organized to prevent the spread of infectious diseases. It is not a body invested with the right to take care of the poor of the town except so far as it may become necessary to provide subsistence to carry out the main purpose of the organization—to wit, to stamp out contagious or infectious diseases. The power to arrest and separate persons implies a power and duty to furnish food and subsistence, but only where a necessity arises by reason of the confinement or restraint. We think the demurrer is good as to any claim presented by the plaintiff for money expended in behalf of her own family.

Can she recover for the provisions furnished to the persons other than her family?

She had a contract to furnish them board in consideration of the money to be paid by them. When they said they had no money to pay for future board she was under no obligation to continue the agreement. Because they were boarders she was under no obligation to furnish them gratuitous board after they stated they could no longer compensate her for future subsistence. When the borough neglected to furnish the provisions which it had promised to supply to the inmates of the house, the plaintiff could come to the relief of the boarders without subjecting herself to any implication that she intended to furnish the groceries as a gratuity. If the

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boarders were in need she was not bound to see them suffer before she came to their rescue.

Of course, if the boarders were able to pay or had credit to buy their needed supplies, they can not escape liability for their subsistence. Any one who has property, money or credit which he can use to support himself can not complain if the board of health refuses to do more than afford him a reasonable opportunity to send out and purchase what is needed: Com. ex rel. Ziegler vs. Guy et al., 34 P. L. J., 275.

If the boarders paid the plaintiff she can not recover from the borough, nor can she enter into a valid agreement with the boarders to bring this suit in their behalf.

The statement is not as clear upon this point as it should be. The plaintiff says the boarders were poor and unable to pay for their board. We think the fair inference is that they did not pay her at any time for the two weeks. It, however, would have been a simple matter to say so if it is the fact. They may not have been able to pay at the time of the quarantine, and yet the payment may have been made afterwards.

The demurrer is clearly good as to a part of this claim, as already shown. The amount demanded includes the supplies used by the members of the plaintiff's family. We can not separate the claim. There is nothing upon the face of the statement which will enable us to fix the amount of the compensation due the plaintiff for the maintenance given to the boarders. The plaintiff is not in a position to demand judgment even if an insufficient affidavit of defence should be filed. She must first file a supplemental statement.

The demurrer to that part of the claim based upon the amount of money expended for her family is sustained, and is overruled so far as it relates to money expended in maintaining her boarders. The plaintiff has leave to file a supplemental statement if she desires to do so.

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JAMES R. BOOTH VS. ANNE THOMSON, FRANK GRAHAM THOMSON AND CLARKE THOMSON.

Ejectment—Advance money mortgage—Distribution of proceeds of sheriff's sale—Report of auditor confirmed and no appeal taken.

A purchaser at sheriff's sale is bound by all the facts and notice that the record of the liens and proceedings discloses.

On a sheriff's sale under a mechanic's lien the holder of a mortgage gave notice that his obligation was given as an advance money mortgage; that about one-half of the face amount of the claim was actually advanced. All parties interested in the sale treated the mortgage as divested by the sale under the record notice and the notice given by the mortgagee. The proceeds of sale were ruled into court, and the mortgagee appeared before the auditor and persisted in his claim that the sale divested his mortgage. The report of the auditor was confirmed and no appeal was taken. *Held*, that a sale on the mortgage gave no title to the purchaser as against the purchaser at the first sale. *Held*, also, that the record discloses that the mortgage was made to raise funds to erect the house, that the mortgagee must have furnished the money knowing that it was to be used for that purpose, and that the purchasers at either sale were bound by this notice by the record.

HEARING before the court, by agreement of the parties, without a jury. No. 16, December T., 1903.

Larzelere, Gibson & Fox, Esqs., for plaintiff.

Evans & Dettra, Esqs., for defendants.

The action of ejectment was brought to recover the possession of two lots of ground situate in Lower Merion township, Montgomery county. Both parties claim title through one James A. Patterson. Plaintiff's claim of title is founded on a sheriff's sale dated February 23, 1903, and the defendants claim title through a later sheriff's sale. The first execution was upon a mechanic's lien; the second execution proceeded on a mortgage. The plaintiff claims the sale on the mechanic's lien divested the mortgage. This is denied by the defendants.

Opinion of the court by SWARTZ, P. J., January 28, 1995.

The case was heard on January 18, 1905. Larzelere, Gibson & Fox appeared for the plaintiff, and Evans & Dettra represented the defendants. We find the facts as follows:

FACTS AS FOUND BY THE COURT.

1. Will. T. Wilkins bought from James A. Patterson a tract of land containing thirteen and one-half acres. Mr. Wilkins, the purchaser, divided the tract into forty-four building lots, and recorded with his deed a plan of these lots. The deed as well as the

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plan shows that the tract of land was without buildings at the time this deed was made, September 25, 1890.

2. Lots Nos. 12 and 13 were noted upon this plan, and on December 5, 1890, Mr. Wilkins executed a mortgage of $4,500 on lot No. 12 in favor of the Bryn Mawr Trust Company; a similar mortgage was placed on lot No. 13, also in favor of the said Trust Company. These mortgages were recorded on December 16, 1890, and show upon their face that buildings were erected or commenced on these two lots between the date when Wilkins purchased the lots and the date he executed the mortgages. This is shown by the stipulations given in the mortgages. The mortgagor was required "from time to time, until payment of said principal sum be made as aforesaid, to keep the buildings mentioned in this mortgage insured for the benefit of the said Bryn Mawr Trust Company, their successors and assigns, in some good and reliable fire insurance company or companies in an amount not less than $4,500. It is also provided in said mortgages that if the mortgagor fails to maintain such insurance, "it shall be lawful for the said Bryn Mawr Trust Company, their successors and assigns, to insure the said buildings in a sum sufficient to secure payment of said principal debt in case of fire, and shall recover the costs and expenses of such insurance in suit upon the mortgage." The buildings could not be constructed between September 25, 1890, and December 6, 1890, and the mortgagees must have known that these buildings were in process of erection, otherwise the stipulation as to insurance would be out of place in the mortgages. An examination of the record would furnish the same knowledge to a contemplating purchaser.

3. On January 27, 1892, Wilkins conveyed the thirteen acres to Paul W. Smith.

4. Between the 14th day of November, 1891, and the 30th day of September, 1892, fourteen mechanic's liens were filed against the buildings erected on lots Nos. 12 and 13. There was one house on each lot; the lots were sixty by one hundred and sixty-five feet—that is, each lot had a frontage of sixty feet. Each house had a front of thirty-five feet and depth of forty feet. Seven of these liens named Will. T. Wilkins as owner; the others did not contain the name of Wilkins except as the person who laid out the lots. The plan is referred to as found in Deed Book No. 349, page 359. This is the record of the deed from Patterson to Wilkins. Two of these liens

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which were filed against Will. T. Wilkins as owner or reputed owner and contractor, show that the materials were furnished for the two buildings more than one month before the mortgages were given to the Trust Company. In one case the amount of lumber furnished prior to December 5, 1890, exceeded seven hundred dollars. This is shown in the bill of particulars annexed to the lien of Stokes Brothers. In the other lien, filed by Clifford P. Allen, the bill of particulars shows that doors, frames and windows were furnished prior to December 5, 1890, valued at more than three hundred dollars. In the body of this lien the claimant declares that "the sum of $1,066.88 is a debt contracted for lumber, planing-mill work and materials constructed and furnished . . . continuously within six months last past for and towards the erection and construction of and on the credit of the said buildings at the times and in the quantities in the annexed bill of particulars mentioned, to wit, from the 28th day of October, 1890, to the 10th day of November, 1891."

5. All the mechanic's liens were apportioned. William Penn, Jr., & Co. reduced their claim to judgment, and lots Nos. 12 and 13 with the buildings were sold by the sheriff on writs of levari facias issued on the William Penn, Jr., & Co. liens. On February 23, 1893, the sheriff returned that he sold the real estate of J. Wistar Evans for $3,102.

6. On the day of the sale the Bryn Mawr Trust Company, which was still the holder of the two mortgages, gave notice that the two mortgages of $4,500 each, held by the company against lots Nos. 12 and 13, were advance money mortgages, and that $2,400 had been advanced on each.

7. A controversy arose over the funds in the sheriff's hands. The money was ruled into court and an auditor was appointed to make distribution. Before the auditor the Trust Company presented a claim of $4,883 on its two mortgages. It had advanced $2,400 on each mortgage to Will. T. Wilkins. The eighty-three dollars represented interest on the sums so advanced. It demanded that this claim be paid from the fund for distribution to the extent of the value of the said two lots of land immediately prior to the commencement of the buildings erected thereon. The auditor found that under the act of June 8, 1881, P. L. 56, these mortgages were entitled to a preference in the distribution over the mechanic's liens to the ex-

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tent of the value of the curtilage—that is, the said two lots, if the mortgages were in fact recorded before the commencement of the buildings. He found, however, that under the evidence these advance money mortgages were recorded after the buildings had been commenced, and thereby lost their preference. He found distinctly that they were advance money mortgages, that they were divested by the sheriff's sale on the two writs of levari facias, and that they lost their preference over the liens because they were not recorded before the buildings were commenced.

8. The auditor awarded the entire fund realized from the sheriff's sale to the mechanic's lien creditors to the exclusion of the mortgages. The court entered a decree confirming the distribution. From this decree no appeal was taken by the Trust Company or any other claimant interested.

9. The mechanic's liens upon which the properties were sold were filed against Paul W. Smith, as owner or reputed owner and contractor. The auditor found that the buildings were commenced by Wilkins before he conveyed the properties to Paul W. Smith. The latter continued the construction of the houses up to the last of March, 1892, when he ceased operations. The buildings were never finished. They had reached as far as the brown coat of mortar, and were in that condition when the sheriff's sale took place.

10. J. Wistar Evans, the purchaser at the sheriff's sale, conveyed the premises to plaintiff, James R. Booth, on May 10, 1894. After the sheriff's sale and before the purchase by Booth a fire destroyed the houses; but the walls, or at least some of them, were still standing when the sheriff's vendee sold to Booth.

11. The lien of William Penn, Jr., & Co., on which the sheriff sold the property, contained a full description of the premises. There was no difficulty in identifying the description in the mechanic's lien with the description in the mortgages.

12. On January 16, 1894, the Bryn Mawr Trust Company brought suit on the two mortgages. At this late day it took the position that the sheriff's sale on the mechanic's liens did not divest these mortgages. The scire facias issued against Will. T. Wilkins with notice to Paul W. Smith and J. Wistar Evans, terre tenants. Judgment was entered for want of an appearance upon two returns of nihil on March 21, 1894. The damages assessed in each case were $2,935.51.

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13. On May 23, 1894, J. Wistar Evans, who was named as terre tenant, made application to the court to open the judgments entered upon the scire facias sur mortgage. He averred that he had no notice of suit, and that the mortgages were divested by the sheriff's sale on February 23, 1893. The court struck off the judgment as to the terre tenant, J. Wistar Evans, upon the ground that a judgment upon two returns of nihil against a terre tenant is void. In passing upon the other question raised the court held that the mortgages were divested by the sheriff's sale because they were advance money mortgages, according to the notice given by the Trust Company itself at said sheriff's sale. The court also called attention to the report of the auditor making distribution of the proceeds of the sheriff's sale wherein the auditor found that the mortgages were divested by said sale. The judgments against J. Wistar Evans were stricken from the record. The judgments as to the other defendants were not disturbed, no doubt because there was no application by any one in their behalf.

14. The Trust Company proceeded on its judgments against the mortgagor, Will. T. Wilkins, and the sheriff's sale was held on June 6, 1894, when the property was struck down to William L. Weaver for $25—that is, $50 for the two lots.

15. At this sale the plaintiff, James R. Booth, gave notice when the property was put up that the mortgages were divested by a prior sheriff's sale when J. Wistar Evans took a fee in said land; that the court of Montgomery county had decided on two occasions that these mortgages were divested, first upon a distribution of the proceeds of the first sheriff's sale, and again when the court struck off the judgments as to J. Wistar Evans, the terre tenant. The person who afterwards purchased at the sheriff's sale under the name of William L. Weaver was present and heard the notice given.

16. On January 8, 1902, William L. Weaver conveyed his title so purchased on June 6, 1894, to the defendants in this suit.

17. After notice was given by the Bryn Mawr Trust Company immediately before the sheriff's sale on February 23, 1893, all parties then interested treated the sale as divesting the lien of the mortgages

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CONCLUSIONS OF LAW.

1. The lien of the mortgages held by the Bryn Mawr Trust Company was divested by the sheriff's sale of February 23, 1893, upon the mechanic's lien.

2. The notice given by the Trust Company at the sheriff's sale, and the subsequent action of the company in presenting its claim upon the mortgages before the auditor appointed to make distribution, estop the Trust Company from proceeding on the mortgages as subsisting liens on the lots Nos. 12 and 13, no appeal having been taken from the decree of the court making absolute the finding of the auditor that the mortgages were divested.

3. The notice given by the Trust Company at the sheriff's sale increased the proceeds of sale, and the company can not be allowed to take a position in direct conflict with that notice to the prejudice of the purchaser who relied upon the notice. The plaintiff Booth succeeded to all the rights and titles of the sheriff's vendee. If the Trust Company is allowed to proceed on its mortgages it is in effect compelling a second payment of its liens by the first purchaser or his vendee. The purchaser at the second sale was not an innocent purchaser without notice. He was bound by the record and all that it disclosed. Both the auditor's report and the order of the court striking off the judgment against the terre tenant, J. Wistar Evans, gave the purchaser notice that these mortgages were discharged by a prior sale.

4. The deed and plan of lots recorded in Deed Book No. 349, page 359, being the deed to Will. T. Wilkins, taken in connection with the record of the two mortgages given to the Trust Company, were sufficient to put an intending buyer at the first sale upon inquiry whether the mechanic's liens found on the record did in fact divest the mortgages.

5. The defendants who purchased from William L. Weaver were bound by all the knowledge or information that the record disclosed. It is not necessary to hold that they were bound by the notice read by the plaintiff at the second sheriff's sale, because a proper examination of the existing record would have disclosed to the defendants all that was contained in said notice. The examination of Weaver's title would disclose that the court held that the

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two mortgages were discharged by the sale of February 23, 1893.

6. Plaintiff is entitled to a verdict for all the property described in his writ to the sheriff in the ejectment suit on trial before us.

ARGUMENT.

The facts are not in dispute. In nearly every case they were taken from the record. The inferences drawn by us in our findings follow necessarily from the admitted facts.

That an intended purchaser at the second sale could by a proper examination have found upon the record the whole history of the first sale can not be questioned. The sale upon the mechanic's lien named Paul W. Smith as the owner or reputed owner, and the proceedings upon the scire facias sur mortgage named Mr. Smith as the terre tenant. In examining the title, a record of mechanic's liens would present itself. Some of these liens were filed against Wilkins, and also named Smith as contractor; others were filed against Smith alone as owner.

If, however, no search for liens or sales against Paul W. Smith was necessary because the conveyance to Smith was subsequent to the creation of the mortgages, still as early as May 23, 1894, an application was made to open the judgments in the suits upon the mortgages, and this application gave notice that the properties had been sold on a sheriff's sale which divested the mortgages. This petition stated that the sale was made on the 23d day of February, 1893, on mechanics' liens which antedated the mortgages, because the liens related to the commencement of the buildings in October, 1890. Later on and before the sale the court in disposing of this application referred to the auditor's report which declared the liens of the mortgages divested, and the court reaffirmed the decree on the report of the auditor that the lien of the mortgages was discharged by that prior sheriff's sale.

That all parties interested at the first sheriff's sale treated the mortgages as divested under the sale is evident from the price realized at that sale, as well as from the price obtained at the last sale. To say that the properties, when sold clear, brought but $50, and when sold subject to the mortgage realized $3,100, is so inconsistent, that we can not accept the declaration. The statement on the part of the Trust Company that it held these mortgages as advance money mortgages had its intended effect upon the bidders at that

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sale. If there was any doubt as to the question whether the sale would divest the mortgages, that doubt was removed after the statement was publicly announced.

These mortgages were divested by the sale on the mechanics' liens if they were advance money mortgages. The act of June 8, 1881, P. L. 56, so declares. The title reads, "An act to regulate the priority of liens as between advance money mortgages and mechanics' liens." The body of the act declares that the mechanics' liens shall have priority of lien over the mortgages. The mechanics' liens shall be paid out of the proceeds of any sale of said property before such advance money mortages except as to an amount equal to the value of such curtilage or lot of ground. How can the value of the curtilage be paid out of the proceeds of any sale if the mortgages are not divested? The act declares that the mechanics' liens have priority of lien upon such buildings. Under the law as it existed prior to the act of 1881, a mortgage would be divested by a sheriff's sale where there was a subsisting lien prior to the mortgage. The act of 1881 made these mechanics' claims prior liens to the mortgages.

It is said that the purchases must be guided by the record and that they are not to be affected by anything not disclosed by the record. There was some evidence on the record from which a purchaser might well infer that these mortgages were given to secure advances made for building purposes. The deed to Wilkins was made September 25th, 1890. He recorded with his deed a plan showing forty-four building lots. They were free from all improvements so far as buildings are concerned. This is shown by the deed as well as by the plan of lots. He owned these lots a little over two months, and then executed two mortgages, aggregrating nine thousand dollars, on a plot of ground one hundred and twenty feet by one hundred and sixty-five feet. It would seem evident that a loan of this magnitude would not be made upon an unimproved lot containing less than half an acre. The mortgage refers to insurance on buildings to secure the loan. It is not probable that Mr. Wilkins could in the months of October and November construct houses upon these lots, 12 and 13. At the time of the sale the liens were on file, showing that a building operation was going on from October, 1890, to March, 1892. The inference that these mortgages were made to raise funds to erect the houses, and that the mortgagees

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"knowingly furnished the money" for that purpose, is irresistible. When we add to this state of affairs the declaration of the mortgagees that the money was furnished as advances, we think a purchaser was bound to know that the act of 1881 applied to the sheriff's sale.

The Trust Company did not stop with its notice at the sheriff's sale. It persisted in its claim that the mortgages were divested. It demanded payment out of the proceeds of sale. The decree of the court confirming the auditor's report that the mortgages were divested, was a decree made in conformity with the demand of the Trust Company. In other words, its claim was reduced to a judgment.

"It is contrary to morality as well as sound policy to permit a party to avail himself of a particular point in a case and afterwards take a position diametrically opposite in another merely because it may be in his interest to deny what he had most solemnly asserted at another time and for another purpose": Goodman vs. Losey, 3 W. and S., 529. The Trust Company, under its notice, pressed its claim against the fund to a judgment. True, it did not succeed in obtaining any money, but the judgment sustained its claim. It is now too late to abandon its position and say we will proceed against the land, although we notified the purchaser before sale that we had no claim on the land: Hyde vs. Kiehl, 183 Pa., 428. It was clearly the intent of the mortgagees to discharge their liens and raise a fund to be applied to their payment. They succeeded in raising the fund at the expense of the purchaser, and they can not now, to the injury of the purchaser, deny or contradict the position that induced the purchaser to part with his money: Birney's Appeal, 114 Pa., 519 To enforce these mortgages against the land in the hands of the sheriff's vendee, after he purchased the property, with the declaration by the mortgagees that they would have no such claim if he became the purchaser, is so repugnant to common honesty that we can not sustain the action. Mr. Booth, the plaintiff, is entitled to the same protection that is due to the sheriff's vendee. He purchased all the right that vested in his grantor. He purchased in May, 1894, six months after the auditor spread his finding upon the record. Even without knowledge of the notice given at the first sale, he acquired all the rights and title the sheriff's sale conferred upon J. Wistar Evans.

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Apart from the act of June 8, 1881, P. L., 56, and independent of the position that the Trust Company can not blow hot and cold against the sheriff's vendee, there is an additional obstacle in the defendants' way. The record was notice both at the first sheriff's sale and at the second, that all persons intending to buy must examine and ascertain the precise facts whether the buildings were commenced before the mortgage was executed.

A purchaser at sheriff's sale is not bound by the knowledge of the mortgagee that the buildings were commenced before the mortgage was taken. The fact that some of the mechanic's liens show that certain materials were furnished before the mortgage was recorded is not sufficient to divest the mortgage at a sale upon such mechanics' liens: Wilson's Appeal, 172 Pa., 354; Wheelock vs. Harding, 4 Pa. Superior Court, 21. If, however, the mechanic's liens, or the mortgage itself, gives the information that the buildings were commenced before mortgage was taken, then the purchaser must govern himself accordingly. Two of the liens show that materials aggregating in value more than one thousand dollars were furnished before date of the mortgages. In the body of one of these liens it is declared that doors, frames and windows were furnished beginning October 28, 1890, and that they were constructed and furnished from said date. Where materials to the value of one thousand dollars are actually supplied for two ordinary houses the proof is rather persuasive that the building operation has in fact commenced. Still under the rulings of the court this is not in itself sufficient to show that the houses were commenced prior to December 5, 1890. When the mortgage is examined it appears, as already shown, that Wilkins bought building lots on September 25, 1890. He recorded his plan of lots October 7, 1890. The deed and plan show that lots 12 and 13 are free from any buildings. The mortgages are given two months afterwards. The mortgagor is required to insure the buildings mentioned in the mortgage. The insurance is to be in a sum not less than $4,500. If the mortgagor does not insure, then the mortgagee may take out policies to insure "said buildings" in a sum sufficient to secure the principal debt.

The record of the mechanic's liens shows that two houses were in process of construction on these two lots, so mortgaged, and that materials were furnished as early as October, 1890. The amount of the mortgage indicated that improvements were in contemplation,

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and when the mortgage itself spoke of buildings and their insurance, the inference is irresistible that the buildings described in the mechanic's liens were the buildings named or referred to in the mortgages. There is no pretence that these lots had upon them any other buildings than those described in the mechanic's liens. If there was any building that needed protection by insurance it was one of these houses. There was enough of substance upon each lot to be designated a building calling for insurance—that is, the buildings covered by the mechanic's liens were, in part, at least, upon the ground when the mortgages were executed. If we are correct, then the case falls directly within the rulings laid down in Reynolds vs. Miller, 177 Pa., 168. It is said this was a mistake of the scrivener in filling out the ordinary blanks in a deed. But how is the bidder at the sale, who is bound by the record, to assume any such mistake? The law declares he must take the record as he finds it.

And now, January 28, 1905, the prothonotary will give notice to the counsel of the filing of our report, and unless exceptions are filed thereto within thirty days after such notice, he will enter a judgment in favor of the plaintiff and against the defendants for the premises described in the writ to the sheriff.

Perkiomen and Sumneytown Turnpike Road Company vs. County of Montgomery.

Turnpike road freed from tolls—Method of computing damages to be paid by the county.

The various elements to be considered by the court in ascertaining the damages may be stated as follows: The actual value of the road-bed, with its bridges, toll-houses and other structures taken by the county; the depreciation of the toll-houses, if any, that were not taken; the productiveness of the entire property; the market value of the capital stock; the net earnings of the company; the dividends paid; the franchise or privilege to take tolls; the state of repair in which the road-bed was found; the value put on the stock by the company itself in its reports to the Attorney General, where such reports were offered in evidence by the county; and generally any other matter which may throw light upon the true value of plaintiff's property as a whole. The value ascertained upon a fair consideration of these various elements is the amount of damages the plaintiff is entitled to recover.

Where a turnpike company occupies a county bridge in the construction of its road-way, it must keep such bridge in repair, under the act of March 17, 1845, P. L. 184. Any default in this matter is a charge against the company that may affect the real value of its property.

The market value of the stock is perhaps the most important test or element to be considered in determining the value of the property.

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Turnpike Road Co. vs. County.

APPEAL to the Court of Common Pleas entered October 9, 1903. No. 8, December T., 1903.

J. A. Strassburger, Esq., for plaintiff.

J. P. Hale Jenkins, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., January 20, 1905.

By agreement the parties waived trial by a jury, and the case was referred to the court for trial.

The plaintiff's turnpike road was freed from tolls by condemnation proceedings under the act of June 2, 1887, P. L. 306. Damages were assessed against the county, and the plaintiff company appealed to the Court of Common Pleas.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW ON HEARING BEFORE THE COURT.

1. The report of the jury condemning the turnpike road was approved by the court on October 5, 1903. By agreement of all parties interested a decree was entered October 22, 1904, directing the plaintiff company to cease the collection of tolls. It was also agreed that the damages should be assessed according to law as of the time the turnpike was condemned, and that the damages assessed should bear interest at the rate of six per centum from the date of the opening of the gates when the collection of toll ceased, to wit, from October 23, 1904.

2. The incorporation of the turnpike company was authorized under the act of the General Assembly approved February 14, 1845, P. L. 33. The road was constructed from the Perkiomen and Reading turnpike road at Perkiomen bridge to Sumneytown, in the township of Marlborough. The length of the road so constructed was about eleven and nine-tenths miles. The whole of the turnpike road was taken and freed under the condemnation proceedings. The company operated the road for more than fifty years.

3. The route of the turnpike is along the Perkiomen creek, and the road-bed for about one-half of its entire extent was constructed of gravel taken from said creek. The other half of the road-bed was built of field stone. This field stone was hard and durable, and has twice the value of gravel for turnpike purposes. Of late years field stones could not be secured in sufficient quantity, and the road-bed was repaired by the use of crushed stone. Field

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stone was more expensive and not any more durable than crushed stone,—the crushed stone made the more valuable road-bed.

4. The macadam or road-bed was of a width varying from twelve feet to about twenty feet. One of the engineers dug up this road-bed at intervals of three hundred feet, and another at intervals of five hundred feet. Measurements were made at each station to test the depth of the stone or gravel. From these estimates we find that the road-bed contained about fifteen thousand cubic yards of gravel and the same quantity of field stone. The amount of crushed stone found is fairly estimated at five hundred tons. The value of the gravel in place is forty cents per cubic yard, and the value of the field stone in place we estimate at seventy-five cents per cubic yard. The crushed stone is worth eighty-five cents per ton, making a total value of $17,675 as the cost of constructing a road-bed such as was found at the time of condemnation and valued at that date.

5. Eleven stone arches were found along the route of the turnpike, containing about nineteen hundred cubic yards of masonry. There were sixty culverts, containing about five hundred cubic yards of masonry. The value of the stone and masonry is fairly estimated at $5,500. There is one wooden bridge constructed on stone abutments. This bridge is in a dilapidated condition so far as the wood-work is concerned, and is not worth more than about $750 estimated as of the time of the condemnation. The terra cotta pipe, fencing and guard-rails give an added value of about $600. One toll-house was taken, and the value of three others was depreciated by the taking. The value of the property taken and the depreciation we estimate together at $1,550. Under these figures the value of the entire property in place is $26,075. In fixing these values we give but little weight to the estimates made by one of the engineers. He was qualified to estimate the quantities of materials, but had no sufficient knowledge of the value of these subject matters to form a reliable judgment.

6. At the time the plaintiff company constructed its road-bed it used a county bridge at Perkiomenville. Under the act of March 17, 1845, P. L. 184, any bridge on a turnpike road in Montgomery county shall be kept in repair by the turnpike company, although such bridge was built by the county. The plaintiff company used this bridge to make a continuous roadway between the termini of its route. The bridge was in fact kept in repair by the turnpike

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company. It is now in need of extensive repairs. It will cost not less than $2,500 to put it in proper repair.

7. The road bed of the company was in fair condition at the time of condemnation. The drainage was good. The managers gave careful attention to the roadway. Some of the bridges, however, called for an expenditure of money that would seriously reduce the net income of the road for several years. This is especially true of the large stone bridge at Perkiomenville, the wooden bridge at Zieglersville, and the arch bridge over Mine run. These needed repairs reduced the value of the plaintiff's property.

8. The sales of stock for the last five years ranged from sixty dollars to seventy-four and one-half dollars per share. The average price, under the testimony, is about sixty-seven dollars per share. There is very little stock for sale in the market. About the only time it is sold is when the owner dies and it is necessary to make sales in the settlement of his estate. The company in its reports to the Auditor General of Pennsylvania gave sixty-five dollars as the average price of sales. This was the amount reported from 1898 to 1903. The shares number three hundred and fifty-seven. The par value is fifty dollars, making $17,850 the capital paid in.

9. The net receipts of the company from 1898 to 1903, both years included, were $8,520.81, or a yearly average of $1,420.14.

10. The dividends paid by the company from 1895 to 1903, both years included, amount to seventy-five per centum, or an average annual dividend of eight and one-third per centum.

11. The stock sales are low in price as compared with some other stocks which pay a similar dividend. This, we are of opinion, is due in part to the fact that the plaintiff's highway is located along the Perkiomen creek, and is crossed by many streams and rivulets. The hazard from freshets which may destroy or injure the bridges maintained to carry these streams and creeks is a matter of some moment. The fact that some of the larger bridges are not in first-class repair may also tend to depreciate the stock.

CONCLUSIONS OF LAW.

1. The value of the road-bed, bridges and other structures is to be determined as of the time of the condemnation. The value of such road-bed is to be considered as an element of damage; but it does not form the sole basis in estimating the damages. What it

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would cost to build the road of the materials found on the highway-bed is not the test. A cheaper material may have been in common use at the time of the condemnation, and yet such cheaper material may form a better and more valuable road-bed. The value of the road-bed itself must be taken in connection with all the property rights of the plaintiff, including the franchise or right to take toll. The value is to be assessed by ascertaining the value of the property to the owner and not its value to the county.

2. The various elements to be considered by the court in ascertaining the damages may be stated as follows: The actual value of the road-bed, with its bridges, toll-houses and other structures that were taken; the depreciation of the toll-houses, if any, that were not taken; the productiveness of the entire property; the market value of the stock; the net earnings of the company; the dividends paid; the franchise or privilege to take tolls; the state of repairs in which the road-bed was found; the value put on the stock by the company itself in its reports to the Attorney General, where such reports were offered in evidence by the county; and generally any other matter which may throw light upon the true value of the plaintiff's property as a whole. The value ascertained upon a fair consideration of these various elements is the amount of damages the plaintiff is entitled to recover.

3. The failure on the part of the plaintiff company to keep in proper repair the county bridge over the Perkiomen creek at Perkiomenville is an element to be considered by the court in computing the damages. The value of the property should be reduced by the amount it will cost to put this county bridge in proper repair. The act of March 17, 1845, P. L. 184, makes it obligatory on the plaintiff company to keep in repair this county bridge so long as the turnpike was operated.

4. From a fair consideration of all the elements that enter into the question of damages we find under the evidence that plaintiff is entitled to a verdict for $23,500, with interest at six per centum, from October 23, 1904.

ARGUMENT IN SUPPORT OF OUR FINDINGS AND CONCLUSIONS.

The evidence of the engineer, Mr. Dager, is in our opinion entitled to much weight. He was selected by both parties to make an investigation of the road-bed and to compute the value of the

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physical property of the plaintiff company. It is true that his inquiry was made prior to the report of the first jury of view, which did not condemn or free the turnpike; but the evidence from both sides shows that the condition of the road-bed did not materially change between the first and second views. No doubt the bridges had undergone some additional deterioration by reason of wear and time. We made some allowance for this, and also reduced his figures somewhat as to the value of the stone and gravel macadam. This road-bed was subject to constant wear, and it is natural that the company under the condemnation agitation would not make any efforts to improve its road bed. Substantial repairs could not be expected when the company had every reason to conclude that the property would be taken from it in the near future.

We also find that the valuation of the bridges by Mr. Dager was very liberal to the plaintiff company. He found their value as a new structure, and then deducted the estimated costs of repairs to ascertain their real value. We all know how easy it is to undervalue the cost of repair to an old structure. The tearing-out process usually discloses more serious defects than were anticipated.

We also find that his value of the gravel in place is somewhat excessive. He values the gravel at forty cents per cubic yard, but when he computes the value of the entire road-bed he allows forty cents per ton. A cubic yard weighs more than a ton; it weighs one and one-third tons. This may have been an unintentional slip on the part of the witness. The evidence shows that the gravel is furnished by the load, and a two-horse load will, we think, under this evidence, average something beyond a ton. Our estimates are based upon cubic yards. In estimating the value of the field stone in the road-bed, we think too much weight was given to the cost of field stone in 1903. In determining the value of the road-bed, the inquiry was not what did it cost to put the stone in place but what was the value of the road-bed as viewed by the jury. Field stone, according to the evidence, cost one dollar and twenty-five cents per cubic yard; and yet their value for road purposes, according to Mr. Koons, who has experience in the matter, is twenty-five cents less than crushed stone. Crushed stone can be placed upon the road at an average of ninety cents. If a road-bed made of crushed stone is more valuable than one made of field stone, it will not do to estimate the actual value of the road-bed at the present cost of field

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stone. Our allowance of seventy-five cents per cubic yard, we conclude, is a fair estimate for these field stone, as found in the road-bed in October, 1903.

It is very difficult to estimate the cost of the necessary repairs to the stone bridge at Perkiomenville. The witnesses differ very widely in their estimates. The lowest is one thousand dollars, while the highest is more than six thousand dollars. The estimates in excess of three thousand dollars are based upon a contingency. The witnesses to these higher figures do not say positively that the two stone arches must come down. Estimates based upon an uncertainty should not receive the same weight as those founded upon positive assertions made by competent witnesses who made a sufficient investigation to give a reliable judgment. Under the evidence, our finding that it will cost twenty five hundred dollars to put this bridge in reasonable repair is just and fair in our opinion.

As this bridge did not belong to the turnpike company, it follows that an expenditure of twenty-five hundred dollars to repair it is a charge upon the treasury of the plaintiff company. If the company had repaired the bridge prior to October, 1903, as it ought to have done, the costs for the work and materials would have been a charge upon the holdings of the turnpike company. If the company had assets worth $26,075, it would have taken just $2,500 of this property to discharge its obligation for the bridge repairs. Even if the company has in hand other moneys to pay for such repairs, we do not see how this would alter its standing. If the county must repair this bridge hereafter, no doubt it would have a good claim against the company if the matter is not adjusted under the present controversy.

The market value of the stock is one of the best tests to determine the value of the property taken. It is not the only element which we must consider, and yet to our mind it is the most important one. If the stockholders receive from the county just what their stock would have brought in the open market, it is reasonably certain that they are made whole for that which was taken from them. The average sales were at sixty-seven dollars. The company placed a value of sixty-five dollars per share upon the stock. If we fix the price at sixty-six dollars, it gives a value of $23,562 for the entire holdings. We think this sum should not be reduced

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by the $2,500, for we must assume that any existing obligation of the company which was not discharged would naturally control and affect the market value of the stock.

The average net income is $1,420. Ordinarily a property of this character, which produces an annual net income of $1,420, ought to be worth over twenty-five thousand dollars. If, however, we bear in mind that this annual income is larger than it would be if the company had made the required repairs to the Perkiomenville bridge, then to obtain the true value we must deduct from the apparent value the $2,500. The net income of $1,420 represents an apparent value of at least $26,000, or, deducting the $2,500, a real value of $23,500.

If we take the value of the road-bed, bridges, toll-houses and other structures, as found by us, at $26,075, and deduct the charge for bridge repairs at the county bridge, we again have a real value of $23,575.

Whether we take the physical road-bed, the market value of the stock, or the net income, we reach practically the same figures; or if we combine all these elements we reach the same result—that is, property of the plaintiffs taken by the county was worth at the time of the condemnation $23,500.

And now, January 20, 1905, the foregoing findings and conclusions are filed in the office of the prothonotary; and if no exceptions are filed within thirty days after notice given to counsel for the respective parties, the prothonotary will enter judgment in favor of the plaintiff, and against the county of Montgomery, for twenty-three thousand and five hundred dollars, with interest on said amount from the 23d day of October, 1904, the costs of these proceedings to be paid by the defendant.

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Orphans Court of Montgomery County.

Estate of Joseph Kensel, Deceased.

A testator provided, "I give unto my dear wife the power to give and bequeath one-half of my estate remaining after her death to whomsoever she pleases, their heirs and assigns forever." The will of the wife provided that the balance of her estate and her share of her husband's estate should go to her nephews and nieces, children of her brothers and sisters, to be equally divided share and share alike. She provided, however, that if her sister, Elizabeth Dager, should outlive her, she should have the income of her children's share as long as she lived. *Held*, (1) the issue of the nephews and nieces (grandnephews and grandnieces) of Harriet Kensel, who died before her will was made, are not entitled to participate in the distribution; (2) the wife had no power under the appointment to create a life estate for her sister, or to create anything less than an absolute estate; (3) the trust fund of the husband's estate is not to be mingled with the wife's own estate and paid to her executor, but is distributable direct to those entitled.

The same testator in another clause of his will provided, "I give and bequeath unto my brothers and sisters, their heirs and assigns forever, one-half of my estate remaining after the death of my wife, to be divided share and share alike." *Held*, (1) that the children of a nephew who died prior to the death of the testator did not participate in the distribution; (2) the act of 1897, P. L. 256, does not apply to the wills made prior to its passage; (3) although all the brothers and sisters were dead at the date of the testator's death, their issue living at the death of the testator are entitled to the shares their parents would have taken if living, *per stirpes*.

ADJUDICATION.

N. H. Larzelere and *Robert Mayer, Esqs.*, for accountant.

George C. Bowker, Esq., for legatees under the will of Harriet Kensel, deceased.

Opinion of the court by SOLLY, P. J., January 14, 1905.

Joseph Kensel, a resident of the township of Whitemarsh, died on the 24th day of April, 1900, testate, leaving surviving his widow, Harriet Kensel, but no issue.

His last will and testament is dated August 6, 1872, and was admitted to probate by the register of wills of Montgomery county on May 9, 1900.

Harriet Kensel, the widow of the testator, had a life estate in the real and personal estate of her husband, after the payment of his debts and funeral expenses. She died on the 10th day of February, 1904, and the estate in remainder now becomes distributable under the testator's will, one-half thereof under the third clause and the other half under the fifth clause.

The third clause reads as follows: "I give unto my dear and beloved wife, the said Harriet Kensel, the power to give and be-

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queath one-half of my estate remaining after her death to whomsoever she pleases, their heirs and assigns forever."

This is a clear power of appointment, to be exercised by the donee by her last will and testament. She has given and bequeathed this one-half to her nephews and nieces. They take as appointees. Her last will and testament is dated the 27th day of July, 1901, and has been duly admitted to probate. The balance of her estate, and her share of her husband's estate, is left to her nephews and nieces, children of her brothers and sisters, to be equally divided, share and share alike, William J. Morris included.

She provides, however, that if her sister, Elizabeth Dager, shall outlive her, she is to have the income of her children's share as long as she lives.

Mrs. Kensel had seven brothers and sisters, Mary A. Dewees, Sarah Rex Hiltner, Hiram Johnson, Margaret Hiltner, Ann C. Morris, Reuben Johnson, and Elizabeth Dager, all of whom died in her life-time with the exception of the sister, Elizabeth Dager, who has survived her. All of those deceased left surviving children (nephews and nieces of Harriet Kensel) except Reuben Johnson, who died in April, 1889, without issue.

1. The children of Mary A. Dewees, who died in May, 1889, are Sarah A. Styer and George Dewees.

2. The only child of Sarah Rex Hiltner, who died in 1878, is Henry J. Hiltner.

3. Hiram Johnson, who died in September, 1889, had five children, Clara Ozias, William H. Johnson, Harriet K. Johnson, Howell C. Johnson, and Catharine Johnson. Mrs. Ozias died in 1875, before Harriet Kensel made her will, leaving issue one child, Albert. William H. Johnson died in April, 1902, after the making of said will, leaving issue two children, Mabel M. and Howell C., the latter of full age and the former in her minority and having no guardian. The other three children are living.

4. Margaret Hiltner died in July, 1898, leaving issue a son, Edwin, and two daughters, Catharine Noblitt and Ada Davis. She had another daughter, Mary Romig, who died in 1880, before the making of said will, leaving issue.

5. Ann C. Morris died in January, 1895, leaving issue surviving, seven children, Martha Goshen, Mary Hellings, Thomas W. Morris, William J. Morris, Henry Morris, Annie Sweeney, and

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Howard Morris. With the exception of Henry Morris, who died in Oklahoma, in September, 1904, these nephews and nieces are living.

6. Elizabeth Dager, who is living, has two children, Ross R. Dager and Ella Cooke.

There can be no question that one-half of the estate is to be distributed to the nephews and nieces of Harriet Kensel, as the appointees of the power conferred upon her by her husband's will, living at her death, and to the personal representative of any who have since died. The issue of nephews and nieces (grandnephews and grandnieces) of Harriet Kensel, who died before her will was made, are not entitled to participate in the distribution. Under the act of May 6, 1844, P. L. 565, the legacies being class ones, they lapsed by reason of their deaths prior to Harriet Kensel: Gross's Estate, 10 Pa., 360; Guenther's Appeal, 4 W. N. C. Nor does the act of July 12, 1897, P. L. 256, protect them: Harrison's Estate, 202 Pa., 331. "The effect of the act of 1897 is to provide that where one is within a class designated by the testator as the object of his bounty, the devise or legacy to him shall not lapse by his death during the life-time of the testator; but the person so dying must have been a member of the class at some time in the period during which the will remains ambulatory, between the execution of the will and the death of the testator."

The issue of Clara Ozias and Mary Romig, therefore, are excluded. We find that at the date of the will of Harriet Kensel there were living nineteen nephews and nieces, namely: Sarah A. Styer, George Dewees, Henry J. Hiltner, William H. Johnson, Harriet K. Johnson, Howell C. Johnson, Catharine Johnson, Edwin Hiltner, Catharine Noblitt, Ada Davis, Martha Goshen, Mary Hellings, Thomas W. Morris, William J. Morris, Henry Morris, Annie Sweeney, Howard Morris, Ross R. Dager, and Ella Cooke. William H. Johnson having died after the will of Harriet Kensel was made, his children, Mabel and Howell C. Johnson, are entitled to his one-nineteenth share. Henry Morris having died since the death of Mrs. Kensel, his share is payable as a vested legacy to the administrator or executor of his estate when appointed in Oklahoma.

Our attention has been called to that part of the will of Mrs. Kensel in which she directs that if her sister, Elizabeth Dager, outlives her, she shall have the income of the share of her children as

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long as she lives. And we are asked to decide whether she had the power under the appointment to create a life estate.

We think that it was not within the power of Mrs. Kensel to bequeath anything less than an absolute estate. Her husband empowered her to bequeath nothing less. Upon the authority of Horwitz vs. Morris, 49 Pa, 213; Wickersham vs. Savage, 58 Pa., 365; and Smith's Estate, 4 W. N. C., 265, we hold that the provision with reference to Mrs. Dager can not be carried out.

It was suggested by counsel representing the will of Harriet Kensel that one-half the fund here should be awarded to the executor and be distributed by him. The reason given is that she has blended her estate and that part of her husband's estate over which she had power of appointment and directed payment of her debts. We are referred to Stokes's Estate, 18 Phila., 175, as authority. We do not think, however, that there is any necessity to have two distributions. The separate estate of Mrs. Kensel is distinct from the estate of her husband which she disposes of. She simply gives both to the same legatees, excepting a special pecuniary gift to a nephew. There is no difficulty whatever in awarding the husband's estate to those entitled, and the wife's estate to her beneficiaries. Time and expense are saved. We fail to see any reason why Stokes's Estate should be followed in this case.

The other half of the estate is to be distributed under the fifth paragraph of the will of Joseph Kensel, which reads as follows: "I give and bequeath unto my brothers and sisters, their heirs and assigns forever, one-half of my estate remaining after the death of my beloved wife, the said Harriet Kensel, to be divided share and share alike."

Joseph Kensel had seven brothers and sisters. Four of them died before the will was made. At that time John Kensel, Catharine S. Lits and William P. Kensel were living. Their surname seems to be spelled "Kentzel" or "Kentzell." They are also dead; they died before the testator, but after the making of the will.

1. John Kentzel died January 29, 1893, leaving issue three children, Catharine K. Tyler, William G. Kentzel and Joseph Kentzel. The latter died August 9, 1901, in the state of Indiana, unmarried, and without issue.

2. Catharine S. Lits, whose first husband was Charles P. Bond, departed this life at Philadelphia, October 28, 1888, leaving issue five

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children, all of whom are living, Letitia F. Bond, Charles T. Bond, Elizabeth Batezell, J. Horace Lits, and Walter K. Lits.

3. William Kentzel died at San Francisco, April 19, 1889, and left issue five children, James W. Kentzel, Joseph E. Kentzel, Theodore B. Kentzel, Richard Widey Kentzel, and Robert Watt Kentzel. The first three are living. Richard died June 15, 1902, in California, intestate, unmarried, and without issue. Robert died at San Francisco, California, April 10, 1901, leaving a widow, Jennie, and issue two minor children, Myrtle S. and Leonide M. William Kentzel had another daughter, Leonide, who died February 15, 1888, at San Francisco. She left a child, who can not participate in the distribution under any of our acts of Assembly.

It will be observed, therefore, that when the will of the testator was made there were living two brothers, John and William, and a sister, Catharine, and that none of them survived him. It will also be observed that all left children surviving the testator. The accountant's counsel submitted that the distribution of the one-half of the fund under the provisions of the fifth item of the will is to be made according to the act of July 12, 1897, P. L. 256. We are of the opinion that this act does not apply to this case, because the will was made long prior to its enactment. The act is prospective, not retroactive. It provides that no devise or legacy *hereafter* made, etc., shall be deemed or held to lapse, etc. The second section of the act of May 6, 1844, P. L. 564, which provides that no devise or legacy *hereafter* made, etc., was held in Martindale vs. Warner, 15 Pa., 471, not to apply to a will made before its passage, even though the testator died subsequent thereto. The reasoning of that case applies with full force to the act of 1897. Nor does the act of June 4, 1879, P. L. 88, which provides that every will with reference to the real and personal estate comprised in it shall speak and take effect as if it had been executed immediately before the death of the testator, apply here, because it relates to the subject of the bequest and not to the object of the gift: Lohr's Estate, 15 Lancaster Bar, 41. The well considered opinion of the court in that case leaves no doubt upon this point.

Our first impression was that the bequest of one-half the testator's estate remaining after the death of his widow, to his brothers and sisters, was such a class legacy as to bring it within Guenther's Appeal, 4 W. N. C., 41, and Gross's Estate, 10 Pa., 360; that a lapse

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had taken place because of the deaths of all the members of the class in the life time of the testator, and as there was no residuary clause in the will the fund would have to be distributed under the provisions of the intestate laws. Upon further reflection we are of the opinion that the cases cited do not apply here. As pointed out by Judge Penrose in Reynold's Estate, 11 Dist. Rep., 388, there is a difference between a gift to "my brothers and sisters in equal shares," as here, and a gift to "the children of my brothers and sisters, share and share alike," as in Gross's Estate. In the latter case the individuals composing the class are indeterminable and perhaps unknown to the testator; in the former case they are determinable and were known to him.

"Where a testamentary gift is clearly to a class, either at the death of the testator or at the expiration of an intervening estate, the persons entitled are to be ascertained at the time it takes effect, all being excluded who are not then members of the class. But because the legatees are described by their relationship, either to themselves or to the testator, and not by their individual names, it by no means follows that they are to take as a class and not as individuals. . . . There is no rule of law on the subject, and the question is always one of intention, to be determined in each case from the whole will and from the circumstances surrounding the testator at the time of its execution, with the light afforded by the presumption in favor of vested interests as against such as are contingent or defeasible": Wentzel's Estate, 12 Dist. Rep., 63. See also Cooper's Estate, 13 Dist. Rep., 127.

As was said by Judge Ferguson, speaking for the Orphans Court of Philadelphia, "while we must follow Gross's Estate in cases like it, we do not feel obliged to do so in cases from which it can be distinguished." This was adopted by the Supreme Court in considering the case on appeal: Bradley's Estate, 166 Pa., 300.

We are of the opinion, therefore, that the issue of the two brothers and sister of the testator (they having been alive when the will was made but dying afterwards) living at the death of the testator, are entitled to the shares their parents would have taken if living, *per stirpes*, and distribution will be accordingly made. The child of Leonide, deceased daughter of William Kentzel, does not participate.

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Court of Common Pleas of Montgomery County.

BOROUGH OF NARBERTH VS. CHARLES E. SHOEMAKER.

A borough ordinance prohibiting the erection of a frame or wooden building without permission of council, is unreasonable and arbitrary, and therefore void. Under such ordinance the council reserves to itself the arbitrary power to refuse the application of one person and grant that of another, and its action does not depend on its conformity to a general rule.

As the ordinance is a penal statute it should define with some particularity what is meant by the words "frame or wooden building." In this case the part of the structure complained of was partly frame and partly brick, the latter predominating. *Held*, not to come within the meaning of the ordinance.

APPEAL. No. 170, October T., 1904.

Theo. Lane Bean, Esq., for plaintiff.

Evans & Dettra, Esqs., for defendant.

Opinion of the court by WEAND, J., February 6, 1905.

HISTORY OF THE CASE.

The borough of Narberth brought suit against defendant before a justice of the peace to recover the penalty imposed by an ordinance for erecting a frame building without a permit first obtained.

Judgment was entered against the defendant, and he was allowed an appeal. The case, by agreement of the parties, was heard before the court without a jury.

FINDINGS OF FACT.

1. On the 16th day of July, 1898, the town council of plaintiff borough enacted an ordinance (No. 74) as follows:

"An ordinance to regulate the location and erection of frame and wooden buildings within the borough, and the penalties attached thereto.

"Section 1. The council of the borough of Narberth does ordain that hereafter it shall not be lawful for any person or persons to put up, erect, or build any frame or wooden building within the limits of the borough, except by permission of council. If said permission is granted, said building shall be located at least thirty feet from any other building.

"Section 2. That in addition to the penalty prescribed for the failure to procure a building permit, any person or persons who shall

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put up, erect or build any frame or wooden building contrary to the provisions of this ordinance, he or they so offending shall forfeit and pay a penalty of one hundred dollars ($100), to be collected for the use of the borough in such manner as penalties are collected by law, and take down said building or buildings.

"Section 3. Nothing in this ordinance shall be construed as affecting the erection or construction of a building wherein stone or brick is used to the line of the second floor joists."

2. Defendant obtained a permit to erect two buildings (twin houses), "to be done in conformity with the ordinance of the borough"; and when applying for the permit exhibited to the clerk of councils blue prints of plans showing the proposed erections.

3. The building in question is described as follows: The front of the house, practically one-half of it, is thirteen feet six inches of brick to the line of the second story; then there is an angle fourteen feet by five inches, on the side, of brick running to the joists of the second story; then a projectment for a doorway, five feet or thereabouts, in brick; then there is a continuation on the side of about thirteen feet, to the bay-window, of brick; then there is a frame bay-window which stands out from the wall eighteen inches, and is eight feet in width. Following the bay-window is a pier about two feet of brick, that separates the bay-window from the laundry, which is frame; then there is a continuation of ten feet frame-work on the side of the laundry, and in the rear there is also a continuation of about ten feet of frame-work joining the brick wall in rear of building.

4. After defendant had commenced his building he received notice that he was violating the ordinance in question.

5. We find as a fact that the building in question is not a frame or wooden building within the meaning of the ordinance.

CONCLUSIONS OF LAW.

1. That the ordinance is unreasonable and arbitrary, and therefore void.

2. That even if valid, defendant has not incurred the penalty.

3. That judgment should be given in favor of defendant.

ARGUMENT.

The ordinance is not an entire prohibition of frame or wooden buildings, but leaves the erection of them to the arbitrary action of

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councils. There is nothing to guide their action, nor any rule given by which permission is to be regulated. There is nothing said about locality, surroundings, or under what conditions permits shall be granted or refused. It therefore can permit A to build, but refuse permission to B. It can permit erections in one block or on one side of the street and refuse it on the other, although in each case the conditions might be the same. It thus affords opportunities for favoritism and discrimination. Inevitably this would lead to the introduction of the matter in the election of council. A favored builder would endeavor to secure the election of his friends, and thus a man without this influence would be discriminated against. One council might issue permits indiscriminately; the next refuse them altogether.

In Commonwealth vs. Harris, 10 W. N. C., 10, Biddle, J., said of an ordinance relating to bay-windows: "Is it competent for the councils under this law to say to the owners of two adjacent properties that the one may and the other may not erect a bay-window? Because if each case is to be individually passed upon, and does not depend upon its conformity to a general rule, this would be the result not only in regard to bay-windows but to every other purpose for which it would be desirable to occupy the highway." This case was affirmed on an appeal to the Supreme Court, and its principle affirmed in Reimer's Appeal, 100 Pa., 182.

In City of Newton vs. Belger et al., 143 Mass., 598, the ordinance provided, inter alia: "No person shall erect, alter or rebuild, or essentially change, any building, or any part thereof, for any purpose other than a dwelling-house, without first obtaining in writing a permit from the board of aldermen."

The court said: "The first section does not contain any regulations to guide the land-owner in the construction or alteration of a building upon his land; it broadly prohibits any erection or alteration of a building other than a dwelling-house, in any part of the city, unless the land-owner first obtains a written permit from the board of aldermen. It does not merely forbid the erection of any building which is hazardous, or which exposes other property or persons to danger. It does not require the board of aldermen to adjudicate and determine that it is necessary to prohibit any proposed building for the purpose of securing the prevention of fire or the preservation of life. On the contrary, it gives them the power,

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by refusing a permit, to prevent the erection of any building except a dwelling-house for any reason which may be satisfactory to them. Under the ordinance they may refuse a permit, because, in their opinion, it is desirable that certain parts of the city shall be used only for handsome dwelling-houses, and that all buildings for the purpose of trade shall be excluded, though in no sense dangerous." The court concludes that the ordinance could not be justified as a reasonable exercise of the authority conferred by the statute.

The law governing the case is stated in a very clear and logical opinion of the Supreme Court of North Carolina in State vs. Tenant, 110 N. C., 609, 14 S. E., 387: "An ordinance which provides that no person shall erect, add to, or generally change, any building, without first obtaining the permission of the board of aldermen, is void in prohibiting the erection of buildings, irrespective of the materials to be used, and also in reserving to the board the arbitrary power to refuse the application of one person and grant that of another."

To the same effect is Bills vs. City of Goshen, 117 Indiana, 221, 20 N. E., 115.

In Livingston vs. Wolf, 136 Pa., 519, speaking of ordinances, the court said: "This power must be exercised by regulations that are general and uniform, that are reasonable and certain, and that are in conformity with the constitution and laws. When so exercised, it is binding on all the inhabitants of the municipality. . . . That the courts must judge of the reasonableness of the action of the municipality, and that such action is not binding if it is unreasonable, was held in Kneedler vs. Norristown, 100 Pa., 368; and that its action must be general, bearing equally upon the citizens, was ruled in Reimer's Appeal, 100 Pa., 182."

What is a frame or wooden building within the meaning of this ordinance? When we speak of a "building" we refer to it in its entirety and not to its parts. Can a building half brick and half wooden be considered a frame or wooden building any more than a brick building? This ordinance recognizes a building partly frame, for its third section says "it shall not be construed as affecting the erection or construction of a building wherein stone or brick is used to the line of the second floor joist." How much brick or how much stone is to be used is not stated. Keeping in view that

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this is a penal statute—a fine imposed and the building to come down—how can any one know how to build?

What councils no doubt intended to provide against was a building the first story of which should be composed entirely of brick or stone; but reading as it does, it can only mean an entire frame or wooden building. The prohibition extends alone to the first story, treating that as a building.

The city of Pittsburg had an ordinance relating to wooden buildings. William Stewart erected a building, and he was arrested, indicted, and tried for violating the ordinance. In the Supreme Court, Sergeant, J., said: "The facts found by the special verdict show that the building in this instance was what is commonly called brick-pane, composed partly of wood and partly of brick. If this were a remedial law, it might be construed liberally so as to effectuate the design of the Legislature, which was to guard against the danger of fires in a populous city. But being a penal statute, and this proceeding of a criminal cast, the rule of law is well settled that such statutes are to be construed strictly, and that no one is to be brought within the penalty of the act who is not within the plain meaning of the words strictly construed; and they are confined to wooden buildings only." The court held that a building partly of brick and partly of wood was not a wooden building within the ordinance.

And now, February 6, 1905, unless exceptions are filed to the findings of the court within the time limited by the act, the prothonotary will enter judgment and verdict for defendant with costs.

PETER V. HOY VS. MONTGOMERY MUTUAL FIRE INSURANCE COMPANY.

Appeal—Defective bond—Practice.

Where an appeal is taken from the Common Pleas to the Superior Court, and the appellant fails to give a proper bond as required by Sec. 6 of the act of May 19, 1897, P. L. 67, an execution issued after twenty-one days from the entry of judgment will not be stayed because a proper bond is subsequently entered.

RULE to set aside or stay execution. No. 42, March T., 1905.

Henry Freedley and *Jacob V. Gotwalts, Esqs.*, for plaintiff.

E. F. Slough, Esq., for defendant.

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Hoy vs. Insurance Co.

Opinion of the court by WEAND, J., February 20, 1905.

Judgment was entered against defendant, on the verdict of a jury, December 12, 1904.

On January 7, 1905, an appeal to the Superior Court was filed with a bond in double the amount of the verdict.

On January 17, 1905, plaintiff issued execution.

On January 21, 1905, defendant presented its petition to this court for a rule on plaintiff to show cause why the execution should not be set aside because of the appeal.

Plaintiff justifies the issuance of the execution because the bond filed does not comply with the act of Assembly in order to make the appeal a supersedeas.

The act of May 19, 1897, P. L. 67, in Sec. 6 provides that an appeal from any order, judgment or decree directing the payment of money shall operate as a supersedeas on appellant giving bond in double the amount of the said order, judgment or decree, and all costs accrued or likely to accrue, etc.

The bond in this case therefore did not comply with the requirements of the act in order to operate as a supersedeas; and more than twenty-one days having elapsed since the entry of the judgment, there was nothing to prevent execution.

In Smead vs. Stuart, 194 Pa., 578, the defendant filed an appeal, giving security only to cover costs. The plaintiff thereupon issued execution on his judgment, which the court below refused to stay. On appeal the action of the court below was sustained.

The cases cited by defendant from the Supreme Court were all prior to the passage of the act of 1897; and Commonwealth vs. Conway et al., 22 C. C., 428, is entirely in harmony with this opinion. In that case the appeal was perfected within six months and before the second execution issued; but in the case under consideration there is no perfect appeal.

On the argument defendant moved to file an additional bond. We will permit this to be done, but it can not operate as a supersedeas. It only takes effect from date of filing of the new bond; but as an execution had already issued after three weeks from entry of the judgment, it can not be superseded by a subsequent bond or appeal.

And now, February 20, 1905, the rule granted is discharged.

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EMMA ROBERTS VS. HENRY G. LENTZ, SURVIVING EXECUTOR OF BENJAMIN LENTZ, MORTGAGOR, REAL OWNER, AND TENANT IN POSSESSION.

Where a mortgagor admits that he executed and delivered the mortgage, the burden is upon him, in a suit upon the mortgage, to show a failure of consideration.

Where an agent acts for three distinct parties, the presumption is, until the contrary is shown, that his acts and intentions were honest, and that he was faithful to his duty to all three parties. The presumption of innocence continues until he has committed an act significant of fraud.

MOTION to reduce judgment. No. 82, March T., 1904.

Hillegass & Larzelere, Esqs., for plaintiff.

E. L. Hallman and *Henry Freedley, Esqs.*, for defendant.

Opinion of the court by SWARTZ, P. J., February 27, 1905.

Upon the trial of the issue we reserved the question, "Is there any evidence to be submitted to the jury on which the plaintiff is entitled to recover anything beyond seven hundred dollars, with interest and commissions?"

The jury rendered a verdict for the face of the mortgage, being eleven hundred dollars, with interest and commissions. We instructed the jury that if they believed the evidence they should render a verdict for the plaintiff's claim. The defendant admitted that the sum of seven hundred dollars was received by him. Mr. Silas Jones, as the agent for the plaintiff, handed over his own check for that sum. Mr. Jones, with the consent of Mr. Lentz, claimed that the balance of four hundred dollars should be retained by him to pay off a judgment of that amount held by the Burns estate against the Benjamin Lentz estate.

Counsel for the defendant contended that there was no evidence that Mr. Jones still had in hand the money of the plaintiff, beyond the seven hundred dollars, at the time the mortgage was executed.

No motion was filed in court by either party for judgment. The plaintiff directed the prothonotary to enter judgment upon the verdict of the jury. This was done. When the error was discovered it was agreed by the parties that "the judgment in the above case should be stricken off, and that the case should be submitted to the court as upon a motion for judgment on the point reserved."

The defendant signed the mortgage, and thereby acknowledged that he had received full consideration. There was no evidence at the trial to gainsay this admission. Miss Roberts had placed in the

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hands of her agent $1,350. He claimed to hold $1,100 of this sum. He advanced to Mr. Lentz $700, and with the latter's permission retained the balance of $400 to pay a debt due from Mr. Lentz. Mr. Jones received the $400 as the legal representative of the creditor to whom the $400 was due, or he received it as the agent of Lentz to pay over the money to the creditor. When Mr. Lentz agreed that Mr. Jones should retain the money for that purpose, he became the agent of Lentz and not of Miss Roberts. We can not assume that Mr. Jones did not have the money at that time. He claimed to have it in his possession by agreeing that it should be used in paying the Burns judgment. We can not assume that he embezzled the money of Miss Roberts in the absence of any evidence to that effect before us. He not only claimed to hold it for the purpose of paying the judgment, but he declared again and again that the judgment was paid by the settlement at the execution of the mortgage. It is true that the evidence disclosed that a suit was pending on the Burns judgment; but this does not show that the judgment remained unpaid.

When counsel for the defendant alleges that Mr. Jones did not have the four hundred dollars at the time the parties held their settlement in Mr. Dickinson's office, when the mortgage was executed and delivered, the burden is upon him to show that fact. To say that the defendant did not receive it into his hands does not sustain the allegation that Mr. Jones did not have the money, for it was not intended by Mr. Lentz that the money should be paid into his hands. Mr. Lentz said to Mr. Jones, "Keep the four hundred dollars as payment of the Burns judgment." Mr. Jones answered, "I have it for that purpose, and the judgment is paid." There is not a particle of evidence that Mr. Jones did not in fact have the money in hand at the time the mortgage was executed.

The principle so clearly laid down in Lerch vs. Bard, 162 Pa., 316, where a man acts in a double capacity, is applicable to the facts in the case before us. Mr. Jones, who was the agent for Miss Roberts in the investment of her eleven hundred dollars, was also representing the Burns judgment; and, in fact, he was the agent of Mr. Lentz to procure the loan. When he was acting in this triple capacity it must be presumed, until the contrary is shown, that his acts and intentions were honest; that he was faithful to his duty to all three parties. When he received the mortgage for Miss Roberts,

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it was his duty to hold the eleven hundred dollars for his principal, Mr. Lentz; and when he offered to satisfy the judgment, but was prevented because the record was not in a condition for his satisfaction, it was his duty to hold on to the money as the agent of Mr. Lentz, or at the request of Mr. Lentz to receive it as the representative of the Burns estate in full payment of the judgment. The presumption is that all these changes in the transfer of the money were made because duty would require him to make them.

And now, February 27, 1905, judgment is entered for plaintiff upon the verdict of the jury notwithstanding the question reserved at the trial.

ANDREW B. KRIEBEL vs. GEO. N. MALSBERGER, COUNTY TREASURER OF MONTGOMERY COUNTY.

Rebate of taxes—Timber-land entitled to rebate—Act of April 11, 1901, P. L. 77, how tax-payers may obtain benefit of the act.

Where a tax is paid without any duress of person or goods or without any pending danger of seizure or sale of property, such payment is voluntary and can not be recovered back even if paid under protest.

It is the duty of the assessor to separate the timber-land in his valuation so that the county treasurer may have a basis to compute the rebate under the act of April 11, 1901, P. L. 77.

Unless the county treasurer is furnished the local rates of school and road taxes, he can not compute the rebate on the county tax.

The tax-collectors, assessors and county treasurers should coöperate with the land-owner in honest efforts to give effect to the act of April 11, 1901.

Technical objections on the part of the county treasurer should not be interposed to defeat the rebate the law intends to give to the tax-payer.

EXCEPTIONS to the record before the justice. No. 26 June T., 1903.

H. M. Brownback, Esq., for plaintiff.

N. D. Tyson, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., October 5, 1903.

The plaintiff claimed a rebate on his county tax for seven acres of timber-land. He filed with the county treasurer the affidavit required under the act of April 11, 1901, P. L. 77.

The record before the justice shows that the plaintiff's farm of seventy acres was assessed for taxation at six thousand dollars.

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Four acres of this farm consist of timber-land, entitled to the rebate fixed by the said act of 1901. The plaintiff is also the owner of a smaller tract of land containing ten acres, which was assessed for taxation at six hundred dollars. Three acres of this tract consist of timber-land entitled to the rebate. Each tract was assessed as a whole. The return of the assessor fails to disclose the relative values of the farm-land and the timber-lands. What part of the whole assessment represents the fair value of the timber-land is not shown by the assessment, nor was it shown to the county treasurer or before the justice at the hearing. The rate of county tax is two mills; the rates for the school and road taxes were not shown before the treasurer or the justice.

The county treasurer refused the rebate when plaintiff called to pay his tax; and the latter paid his entire county tax but under a protest. He then brought suit to recover back the rebate which the county treasurer failed to allow.

The justice divided the entire county tax on the seventy acres by seventy, and found the average tax per acre to be seventeen cents.

By the same method of computation he found that the average tax per acre on the smaller tract was twelve cents. Four acres at seventeen cents and three acres at twelve cents made an aggregate tax of one dollar and four cents. Instead of allowing the maximum rebate of eighty per centum, the justice entered judgment for the entire sum of one dollar and four cents. In other words, by his judgment he exempted the timber-land from all taxation for county purposes.

The act of 1901 declares that the rebate shall be equal to eighty per centum of all taxes, county and local, or so much of the eighty per centum as shall not exceed in all the sum of forty-five cents per acre.

Even if we assume that the method of ascertaining the assessed valuation of the timber-land is allowable, the question still arises, What is the amount of the local taxes? The school and road taxes may be so high that eighty per centum thereof, with the county rebate, will exceed forty-five cents per acre. The act declares that under such conditions the several taxes shall rebate pro rata, so that the aggregate rebate shall not exceed forty-five cents per acre. Unless all the tax rates, county and local, are known, it is impossible to make the pro rata computation required by the act of 1901. We

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fail to see how the county treasurer could compute the rebate; there were no facts before him from which such calculation could be made.

It is argued that the plaintiff was not in default; that he filed his affidavit, and that this was all the act of 1901 required of him. If this be true, then he was not required to pay his tax until the treasurer could inform him of the exact amount due. The plaintiff could not be compelled to pay until he knew the amount of his tax; and if he paid an excessive sum before the correct tax was ascertained or demanded, it was a voluntary payment. The treasurer refused to allow any rebate; there was no compulsory payment. It was not made under any duress of person or goods or under any impending danger of seizure or sale of property. Under such circumstances a tax can not be recovered back even if paid under protest: Union Insurance Co. vs. City of Allegheny, 101 Pa., 254; Peebles vs. City of Pittsburg, 101 Pa., 308.

We can not agree that the plaintiff did his whole duty. If we admit that the county treasurer was bound to know the amount of the tax assessed against the timber-land without any aid from the plaintiff, it does not follow that it was the treasurer's duty to hunt up the collectors of the school and road taxes and ascertain from them the rates of said local taxes. As already shown, without a knowledge of these local rates the treasurer could not compute the rebate on the county tax.

The judgment of the justice was clearly erroneous, because it was entered for the entire tax on the wood-land and not for eighty per centum thereof.

The act of 1901 is crude. The method of carrying it into execution is surrounded with difficulties. If the assessors will see to it that the timber-lands entitled to the rebate are separately assessed, the difficulty will be greatly reduced hereafter.

Owners of timber-lands are entitled to the benefit of the new act, and county treasurers and local tax-collectors should coöperate with the land-owners in honest efforts to give effect to the act. By calling to their aid the assessors, the problem no doubt can be solved, so that equal justice will be done to the tax-payer as well as to the county and township. No citizen will insist upon a technical objection on the part of the treasurer or tax-collector which will defeat the rebate that the law intends to give to the tax-payer.

We are compelled to set aside the proceedings before the justice. The judgment of the justice is reversed.

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NARBERTH SEWER COMPANY VS. BOROUGH OF NARBERTH.

Equity—Demurrer—Practice.

A bill in equity which alleges a grant from a borough to construct a sewer system, and complaining of actual or threatened obstruction to plaintiffs' work in violation of the terms of the grant, sets forth *prima facie* a good cause of action.

A demurrer should comply with Rule 32 of the Equity Rules by "stating the particulars and assigning the reason or ground in detail."

DEMURRER to plaintiff's bill. No. 3, October T., 1904.

Larzelere, Gibson & Fox, Esqs., for plaintiff.

Wanger & Knipe, Esqs., for defendant.

Opinion of the court by WEAND, J., February 20, 1905.

Plaintiffs allege that, by an ordinance of defendant borough, they were granted a right to construct a sewer system in the said borough, and that they have proceeded to the laying out, construction and operation of said system, etc., but that the borough has obstructed, embarrassed, etc., plaintiff's work by refusing grants, etc., and obstructing plaintiff's work in tearing up the streets to cut off inlets not used.

The bill alleges that plaintiffs have at all times been ready and willing to comply with all reasonable rules and regulations of the borough relating to said operation, etc.

Defendants have demurred to the bill, assigning as reasons:

1. That upon the face of said bill the plaintiff is not entitled to the relief claimed.

We think the bill shows *prima facie* a good cause of action. It alleges a grant from the borough and actual or threatened obstruction to plaintiff's work, in violation of the terms of the grant.

2. That upon the face of the bill it appears that the defendant is not liable to the plaintiff in any way.

3. That the plaintiff has not in or by said bill shown any case entitling him to the relief prayed.

4. That this court has no jurisdiction of the said bill.

Rule 32 of the equity rules requires demurrers to "state the particulars and assigning the reason or grounds in detail." The reasons assigned are so general, and apparently but a repetition, that we are at a loss to know what "the reasons or grounds" are.

It may be that all the prayers of the bill could not in any event be granted, but the face of the bill does show that the borough

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threatens to interfere with vested rights of the plaintiff, and on demurrer this is conceded.

Rule 36 might justify us in bringing the case within the exception stated in the rule. Demurrers are dangerous weapons, unless used with caution and not for delay, and counsel should consider carefully the result if a finding by the court should be adverse.

And now, February 20, 1905, the demurrer is overruled, and defendants are required to answer the bill within ten days from this date, and in default thereof the bill shall be taken against them *pro confesso.*

CHARLES DORAN VS. A. M. BERGEY, CONSTABLE.

A justice who acts as an agent for the collection of a claim, and prosecutes the case before a tribunal where distribution of a fund is made, can not after his claim is rejected act as a justice of the peace and pass upon the merits of the claim in a suit before him.

CERTIORARI to proceedings before justice of the peace. No. 119, June T., 1903.

Larzelere, Gibson & Fox, Esqs, for plaintiff.

Henry I. Fox, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., February 13, 1905.

One of the exceptions alleges that the justice of the peace in a prior proceeding attempted to collect this claim as the agent for the plaintiff.

The constable had in his hands the proceeds of an execution. Certain wage claimants demanded the money. The parties met at the office of an attorney. The justice also attended as the agent or attorney for the plaintiff, Charles Doran. A contest arose over the distribution of the fund, the justice as agent for Mr. Doran contending that the latter was entitled to participate in the distribution of the fund as a wages claimant. The demand was opposed, and the constable decided against the claim made by the agent of Doran.

At a subsequent date the justice as the agent for Mr. Doran again demanded the right to share in the proceeds of the execution. The constable again denied the right of Mr. Doran to any part of the money. On each occasion the justice was recognized as the

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agent of the plaintiff, but the right to participate in the distribution was denied upon the merits of the claim.

Afterwards the justice who presented the claim as agent for Mr. Doran issued a summons against the constable and rendered judgment against him for the full amount of the demand made in the controversy at the office of the attorney where the distribution of the fund was made by the constable.

The relation existing between the justice and the suitor was not the ordinary one that arises where a claim is placed in the hands of a magistrate for collection, and the case does not fall within the ruling found in Wagner vs. Hoffman, 19 Pa. Super. Ct., 414. At the prior hearing in the attorney's office the merits of the case were discussed, and the justice passed upon the validity of the claim by insisting that it should be paid against the protest of other claimants. How, under the circumstances, could he render an unbiased judgment at the hearing before him? When he appeared as the agent for Mr. Doran and insisted upon payment when the merits of his case were discussed, he became a partisan and could not thereafter hold the scales of justice with an even hand.

The justice had no jurisdiction to pass upon the questions involved. The defendant at most was guilty of a breach of duty in the exercise of his office. A justice has no jurisdiction in an action against a constable for not paying out rent in arrear from the proceeds of sale under an execution levied on goods on the premises: Seitzinger vs. Steinberger, 12 Pa., 379. The constable's delinquency is *ex delicto* not *ex contractu*, and consequently the remedy is case and not assumpsit. The rule that a justice has no jurisdiction in actions on the case as distinguished from actions in trespass is stringently enforced "where the violated duty flows from official obligation merely."

The exception relating to the disqualification of the justice is sustained, the proceedings are set aside, and judgment is entered for the defendant with costs, and for the additional reason that the justice had no jurisdiction of the cause of action.

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E. G. WURST vs. JANE WURST.

It is the policy of the law to discourage divorces; and if the libellant concludes to discontinue his proceedings, we see no good reason for interference by the court even after the master has reported against the granting of a divorce.

Where the legality of the marriage is attacked, or where the respondent will suffer a disadvantage by the discontinuance, it is usual to disallow it.

APPLICATION to discontinue proceedings in divorce. No. 84, March T., 1904.

Larzelere, Gibson & Fox, Esqs., for plaintiff.

Wanger & Knipe, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., February 14, 1905.

The master reports that the evidence submitted before him is not sufficient to justify a divorce. Before the report of the master was presented to the court for consideration the libellant applied to the court for a discontinuance of the proceedings. The respondent interposed her objection, and asked that the court pass upon the evidence.

The master was appointed under the act of March 10, 1899, P. L. 8. Under this act the master "shall take the testimony and return the same, together with a report of the proceedings before him and his opinion of the case, to the court." His opinion, however, is not binding upon the court. The rule that is ordinarily applied to proceedings before a master or an auditor, that a finding of fact will not be disturbed except for manifest error, has not been adopted in divorce cases. As the master's report in favor of the respondent is not final, it follows that the court upon a review of the testimony might find that the evidence disclosed a good cause for divorce. We do not wish to intimate that any such conclusion would follow in this case. The matter is suggested to show that the opinion of the master is not final, but must be reviewed by the court: Smith vs. Smith, 15 Pa. Super. Ct., 370. It is the policy of the law to discourage divorces; and if the libellant concludes to discontinue his proceedings, we see no good cause for our interference: Stover vs. Stover, 61 Pacific Rep., 462.

Ordinarily the complainant may at any time prior to a decree have his bill dismissed. The court will not refuse an application to dismiss unless the defendant will thereby suffer a disadvantage, or unless the public has an interest in the action. Where the legality

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of the marriage is attacked, or where there is a charge of adultery, the application to discontinue is usually disallowed. We fail to see how the respondent in this case will suffer any disadvantage by the discontinuance. She says she did not desert her husband, and his withdrawal of the proceedings under the findings of the master is an admission of her allegation rather than a denial of it.

An application of this character is addressed to the discretion of the court; and where there are no facts which furnish a basis on which to rest a denial, the refusal becomes arbitrary: Winans vs Winans, 124 N. Y., 144.

A libellant may suffer a non-suit, as in other actions, save under exceptional cases: Koecher vs. Koecher, 7 Phila., 364.

The application to discontinue the proceedings will be allowed upon the payment of the costs accrued, the libellant to pay the costs within thirty days.

JOHN E. JAMES VS. AUGUST HOMOYER, OWNER OR REPUTED OWNER, AND LEMUEL ALTEMUS, CONTRACTOR.

No. 22, March T., 1904.

Joseph C. Kratz, Esq., for plaintiff.

C. S. Sheive, Esq., for defendants.

WILLIAM R. BUZBY AND ELLWOOD HELLERMAN, COPARTNERS, TRADING AS BUZBY & HELLERMAN, VS. AUGUST HOMOYER, OWNER OR REPUTED OWNER, AND LEMUEL ALTEMUS, CONTRACTOR.

No. 23, March T., 1904.

Joseph C. Kratz, Esq., for plaintiffs.

C. S. Sheive, Esq., for defendants.

A third person who claims an interest as owner in a property has no standing to move to strike off a mechanic's lien where he fails to ask leave of court to intervene as a party defendant.

The claimant is not in default if as subcontractor he fails to file a copy of the contract and specifications between the owner and contractor where he is not in possession of the papers and is unable to procure them after demand upon the owner and contractor.

The fifty-first section of the mechanic's lien act of 1901 makes liberal provision for amendments; and unless amendments are allowed claimants will suffer great hardships, because the requirements of a good lien are so exacting that even a careful attorney in the preparation of the lien may omit some matter demanded by the act.

MOTION to strike off liens, and application to amend liens.

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The same reasons are assigned in each case for striking off the lien. The application is made by August Homoyer and Kate Homoyer. They allege that the lot described in the liens was granted by deed to them on October 9, 1901. The seven grounds for striking off the liens will be considered in the order given in the application against the John E. James lien.

Opinion of the court by SWARTZ, P. J., February 27, 1905.

The first objection is as follows: "There is no averment of any notice to Kate Homoyer of an intention to file a claim." This is true. In the notice given to August Homoyer that the claimant had filed a lien, service was made on the wife of August Homoyer at the premises described in the lien. Whether the person so served was Kate Homoyer does not clearly appear. It is immaterial in what relation she stands to August Homoyer. The lien was not filed against her as an owner. Her interest in the lot and improvements is not affected by the lien. A third person who claims an interest as owner in the property has no standing to move to strike off the lien where he is not a party to the proceeding: Woodward vs. Wilson, 68 Pa., 208. "Where materials are furnished at the instance of a tenant in common in possession, it has been held that a lien may be entered against him, and that it will bind his interest in the premises": Weaver vs. Sheeler, 118 Pa., 639. True, the twenty-fourth section of the act of June 4, 1901, P. L. 431, provides that any one interested in the property described in the claim may by leave of court intervene as a party defendant. Kate Homoyer has not asked for leave to be made a party defendant. But if she did so, and we allowed her application, she could not thereby strike off the lien because no notice was given to her of an intent to file a lien. The claimant may wish to show that August Homoyer was in fact the sole owner of the premises at the time the contract was made with him for the construction of the house. The claimant could not well say to Kate Homoyer that he intended to file a lien against her as owner when no such intent at any time entered the mind of the claimant.

The third objection to the claim alleges that "it does not clearly appear with whom claimant contracted." The lien clearly declares that the contract was made with Lemuel Altemus, the contractor who had a contract directly made with the owner, August Homoyer.

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The fourth objection is that "the terms and conditions of the contract of the parties are not stated in the claim." The liens as filed declare that the plaintiffs made their contracts with the contractor, Lemuel Altemus, in the one case to do the painting and glazing in the construction and erection of the messuage for two hundred and ten dollars; in the other, to install the heating plant and do the plumbing and roofing in the construction and erection of the messuage for the price of four hundred and eighty-eight dollars and sixty-four cents. The claimants say their contracts were verbal and for the quantity of time and materials and value of materials and labor as set forth in the bill of particulars. The application to amend shows that the contracts were in writing, at least in part. Lemuel Altemus had the contract to construct the house, and he sublet certain parts of the work to the claimants for a lump sum or an agreed sum. Mr. James was asked to bid for the glazing and painting. He wrote to the contractor, Mr. Altemus: "I will do the work and furnish all the materials, according to plans and specifications, on the Homoyer house, for the sum of two hundred and ten dollars ($210). Very respectfully, John E. James."

This offer was accepted verbally. The claimant had access to the plans and specifications at the time he submitted his bid, but was not furnished with a copy of them. He has endeavored to secure a copy, and made application to the contractor as well as to the defendant, Mr. Homoyer. He also offered to copy the specifications, and requested of the owner the opportunity to do so. These matters are alleged in the application to amend the lien.

The act of 1901 requires that the claimant shall set forth in his lien "a copy of his contract or contracts if in writing, or a statement of the terms and conditions thereof if any of them are verbal." He did not fully comply with this requisite. When, however, he declared in his claim that he agreed to do the painting and glazing in the construction of the house for $210, and that this contract was made with the person who contracted directly with the owner, he set forth all the information that was contained in his written bid and the verbal acceptance. The owner had his contract with Lemuel Altemus, and therefore had full information as to what constituted the painting and glazing under the contract. We are aware that in Knelly vs. Howarth, 208 Pa., 487, it was held that a copy of the specifications should be filed with the lien. In that case plain-

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tiff was the contractor for the whole building. We do not see how the claimant in the case before us can be asked to do an impossible thing. He made diligent efforts to secure a copy of the specifications. If the owner deemed them necessary to make his defence, he should have furnished them upon the request of the claimant. In Day vs. Penna. R. R., 13 Dist. Rep., 805, the court held that a lien was not fatally defective where a subcontractor failed to file a copy of the specifications, and it did not appear that they were in his possession.

The proposed amendment complies with all that the claimant is able to furnish. We think the amendment should be allowed. The fourth provision or requisite of the claim was not wholly disregarded. It was imperfectly stated. The fifty-first section of the act of 1901 declares that "any claim, petition, answer, replication, scire facias, affidavit of defence, or other paper filed of record, may be amended from time to time by agreement of the parties or by leave of court upon petition for that purpose, under oath or affirmation setting forth the amendments desired, that the averments therein contained are true in fact, and that by mistake they were omitted from or wrongfully stated in the particulars as to which the amendment is desired. Such amendments shall be of right, saving intervening rights." The exception in this section indicates that the right to amend shall be liberally granted, for the provision is that the exceptions shall apply only when the time for filing the lien has expired and the amendment "undertakes to substitute an entirely different property from that originally described in the claim or a wholly different party as the defendant with whom the claimant contracted."

The requisites of a good lien are so numerous and the claimant is required to do so many things to sustain his lien, that it is not surprising that even a careful attorney should fail in some one particular demanded by the act of 1901. Unless there is liberality in allowing amendments as suggested by the fifty first section, the act becomes a snare, and the mechanic who furnishes materials and work upon the credit of a building because of the act finds he is caught and ruined. An examination of the books discloses how again and again the attacks upon the liens are successful, since the passage of the act of 1901. We call special attention to the latter part of the fifty-first section. In the fifth objection it is alleged that

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the lien fails "to give a detailed statement of the labor and materials and the prices charged for each thereof."

The act requires the kind and character of the materials and labor furnished. We think the claim complies with this requirement. The prices charged for each are not necessary where the contract is for an agreed sum, as in this case.

The next objection declares the claim is defective because the demand is for a lump sum. As just stated, the act does not require "a detailed statement of the kind and character of the labor and materials furnished or both, and the prices for each thereof," where the contract is for an agreed sum, as in this case. See also Maddocks vs. McGann, 12 Pa. Dist. Rep., 701.

The claimant asks leave to amend so as to meet the demands of the owner. This amendment is allowed, but we do not deem it necessary to perfect his lien.

It is also alleged that the claim fails to set forth the reason for demanding a lien from a time preceding the filing thereof.

He states that he demands a lien from the commencement of the building. Where there is a new structure, as in the case before us, it is quite evident that the reason for selecting such preceding date is the provision of the act itself, which fixes that period as the date from which the lien attaches.

The amendment cures any defect that may exist by stating definitely the date from which the lien is claimed, to wit, September 19, 1903, because that is the first day the plaintiff furnished any labor or materials, and that this day is subsequent to the date of the visible commencement upon the ground of the work of erecting the building.

The fact that the owner paid the contractor in full is no ground for striking off the lien.

What was said about the James lien applies also with equal force to the Buzby & Hellerman lien.

And now, February 27, 1905, the motion to strike off or quash the liens is dismissed, and the amendments prayed for in each case are allowed, saving all intervening rights.

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F. P. SINNOTT vs. KATE BEARD, REGISTERED OWNER, AND T. H. LODER, REPUTED OWNER.

Mechanic's lien—Contract with person representing himself as owner—Notice of intention to file lien—Right to amend to be liberally extended.

Where the contract is made direct with the owner there is no requirement that the claimant shall give notice of his intent to file a lien.

Where the owner knowingly suffers another person to act as if he were the owner, a lien may be filed against the real owner with the same effect as if he himself had made the contract. Notice in such case is not required of an intent to file a lien, even where the claim is for alterations and repairs.

The right to amend under the fifty-first section of the act of June 4, 1901, P. L. 431, must be granted with the same liberality as the right is conferred by the section.

MOTION to strike off lien and application by claimant to amend his lien. No. 2, December T., 1904.

Frederick C. Clark, Esq., for plaintiff.

Hillegass & Larzelere, Esq., for defendants.

Opinion of the court by SWARTZ, P. J., February 27, 1905.

Quite a number of reasons are given why this lien should be stricken off or quashed.

The lien was filed for alterations and repairs. The contract for the work and materials was made by the claimant with T. H. Loder. In the lien it is alleged that the real owner or registered owner is Kate Beard; that the contract was made with said Loder, who represented himself at the time of the contract to be the owner of the property in the claim described. The claimant further alleges that it was not intended that the said Loder should be the contractor for the real owner; that Kate Beard, the real owner, knowingly suffered and permitted the said Loder to make the contract as if he were the real owner without objecting thereto; that she subsequently knew of said contract and of the work and labor being done, and did not repudiate the same at any time.

The fourth section of the act of June 4, 1901, P. L. 431, provides that "an owner who shall knowingly suffer or permit any person acting as if he were the owner, to make a contract for which a claim could be filed, without objecting thereto at the time, shall be treated as ratifying the act of such person acting as if he were the owner, and the claim may be filed against the real owner with the same effect if he himself had made the contract. Ratification shall also be presumed, and a like subjection to a lien shall follow, if the

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owner, . . . subsequently learning of such contract or of work being done upon his property, shall not within ten days thereafter repudiate the same either by notice to the contractor or subcontractors or by posting such repudiation on the most public part of the structure or other improvement."

The claimant gave no notice to the owner of his intention to file a lien. This failure on the part of the plaintiff is one of the objections to the validity of the lien.

The contract was for repairs and alterations to a house. If the owner is entitled to notice in all cases where the claim is made for alterations and repairs, the lien is bad.

Section eleven of the act of 1901 enumerates the various matters that must be set forth in the claim. The eleventh provision or requisite reads, "when the contract is with other than the owner, or the claim is for alterations or repairs or for fitting up old structures with machinery, gearing, boilers, engines, cars or other useful appliances, when and how notice was given to the owner of an intention to file a claim."

We can find no provision in any section of the act of 1901 which requires notice of an intent to file a lien where the contract was made with the owner. The eighth section provides that any subcontracor intending to file a lien must give notice to the owner. Where the subcontractor has six months to file a lien the notice must be given one month before the lien is filed and within three months from the time he furnished the last work. Where the subcontractor has but three months to file a lien, he must give the notice one month before the lien is filed and within forty-five days from the time he did his last work.

This last provision must refer to claims against leasehold estates or claims for alterations and repairs, for the three-month limit in which a claim must be filed applies to these subjects alone.

The second section of the act has another provision for notice to the owner where alterations and repairs are made by a subcontractor. This section declares that no claim for alterations and repairs shall be valid unless it is for more than one hundred dollars; and in case of a subcontractor, unless also written notice of an intention to file a claim therefor, if the amount due be not paid, shall have been given to the owner on or before the day the claimant completed his work or furnished the last of his materials. It would

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appear that a subcontractor claiming for alterations must give two notices before he can file a lien—first, a notice of his intent on or before the day he completed his work; and secondly, a notice of such intent, with a sworn statement of contract and amount due, one month before he can file his lien.

But what notice is the claimant to give who is other than a subcontractor? The act is silent; there is no provision for it. There would seem to be no good purpose for a notice other than from a subcontractor. The object of the notice by a subcontractor is made clear by the eighth and ninth sections of the act. The owner, under the eighth section, after such notice may withhold from the contractor a sum sufficient to protect himself; and under the ninth section the owner may pay the subcontractor's bill, unless the contractor takes steps to defend against the claim. The subcontractor, if paid by the owner, must assign the claim, and any collateral he may hold, to the owner. If the owner has a direct contract with the workman or material man, there is no occasion for the notice, for he must know whether the claimant is paid, and that he has his right to file a lien for the amount due him.

We conclude, therefore, that when the eleventh section of the act in the eleventh requirement states that a claimant for alterations and repairs must set out when and how notice of an intention to file a lien was given, it refers to such claimants who under the several provisions of the act were required to give notice.

In the case before us the claimant stands in the position of a person who contracted directly with the owner. The fourth section so declares, "the claim may be filed against the real owner, with the same effect if he himself had made the contract." If the claimant gains any advantage over subcontractors it is because the owner is to blame and does not deserve the protection offered by the eighth and ninth sections of the act. Because of his failure to speak when he ought to have spoken, he must now protect himself the best way he can, without any aid from the act of 1901. The claimant is now upon the footing of an original contractor with the owner.

It is contended that the description of the building is insufficient. The lien describes the lot by courses and distances, and names the adjoiners. It is in the township of Lower Merion, on Wynnewood avenue. The building is described as a frame mes-

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suage and tenement two and one-half stories high. The old act of 1836 required the claimant to set forth "the locality of the building and the size and number of the stories of the same." The act of 1901 requires a description of the property against which the lien is claimed, together with such a description of the structure or other improvement as may be necessary for the purposes of identification. Even under the old act, wherein size and stories of the building were specified, it was held that "where there is enough in the description of the situation and other peculiarities of the building to identify it, the provision of the statute is satisfied": McClintock vs. Rush, 63 Pa., 203. We think any person interested in this property would find no difficulty in identifying the same if he were provided with the description given in the claim, and undertook to find it. This is a matter for the jury rather than the court, because it depends somewhat upon the surrounding conditions of the neighborhood in which the property is located. The other objections to the claim relate to matters which we think are met by the application to amend the lien.

In the case of John E. James vs. August Homoyer, in which which there was an application to amend a mechanic's claim, we filed our opinion this day. We refer to it because it contains our views upon the power of amendment under the act of 1901. We think the act under the fifty-first section shows that the right to amend by leave of the court is to be extended liberally. After setting out that the claim may be amended as to matters that were omitted or wrongfully stated, and that such amendment shall be of right saving intervening rights, the section continues, "If the names of the owner and contractor be correctly stated, and the description of the property be reasonably accurate, the claim shall be sufficient notice to the owner, purchasers and lien creditors, though it may have to be amended in other particulars." In McClintock vs. Rush, *supra*, in speaking of these mechanic's claims the court said: "The act evidently contemplated that the claimants should prepare their own papers." We think a claimant under the act of 1901 will have his hands quite full should he attempt to prepare his own papers. There are so many matters that require his attention that the chances are he would omit something required by the act. If the act contemplates that the claimant may prepare his own papers, it is rea-

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sonable that the Legislature should confer a liberal right to amend; and we think it has done so.

The claim does not set out from what date the lien is claimed. This is true; and we think the amendment should be allowed. In a claim for alterations this requirement is purely formal, for the act fixes the time. There can be but a single date. The thirteenth section declares every claim for alterations or repairs of a structure "shall take effect as of the date of its filing."

The claimant had a verbal contract, and he was required to give the terms and conditions thereof. The claim sets out that the contract was made for work and labor and materials in the alteration and repair of the structure named in the lien; that the contract was made with T. H. Loder, who represented himself to be the owner of the property. Where the contract was made with the owner, as we have found in this case, under the claim filed, it is not necessary to give a detailed statement of the kind and character of the labor or materials furnished. The claim was defective in not fully setting out the terms and conditions of the verbal contract or in giving the kind of work done. There is, however, a sufficient statement in the claim as to these matters upon which an amendment can be based. The petition to amend sets them out fully. The amendment, however, should be sworn to by the claimant unless some reason is assigned for submitting the affidavit of some other person.

Upon perfecting the application to amend, the motion to strike off the lien will be overruled, and the amendments will be allowed saving intervening rights. The claimant has fifteen days to perfect his amendment.

Orphans Court of Montgomery County.

Estate of Precila Harley, Deceased.

A testatrix, who died without issue, directed the residuum of her estate, consisting of personalty, to be divided into six shares, and bequeathed, inter alia, one share to her brother Jacob and one share to the children of her deceased sister Catharine. Jacob died in the life-time of the testatrix, leaving issue surviving, to whom the share was awarded.

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Harley's Estate.

When the will was executed two children of the deceased sister Catharine were living Lydia and Louisa; another child, Priscilla, had died before, leaving a son surviving. Louisa died before testatrix, leaving issue three children.

Held, (1) the son of Priscilla did not participate in the distribution, as his mother was dead when the will was executed; (2) the children of Louisa took her share under act of July 12, 1897.

ADJUDICATION.

William F. Dannehower, Esq., for accountant.

Opinion of the court by SOLLY, P. J., March 2, 1905.

Precila Harley, a resident of Lower Salford township, died on November 1, 1903, testate, unmarried, and without issue. Her last will and testament is dated March 1, 1901, and was admitted to probate on November 7, 1903.

The testatrix after making certain pecuniary bequests directed that the rest and remainder of her estate be divided into six equal shares, and bequeathed one share to her brother, Jacob K. Harley; another to the children of her deceased brother, Samuel K. Harley; another to the children of her deceased sister, Mary Moyer; another to the children of her deceased sister, Elizabeth Rudy; another to the children of her deceased sister, Catharine Bechtel; and the remaining one to the children of her deceased sister, Lydia Heckler.

Jacob K. Harley, the brother of the testatrix, died in her lifetime—on April 3, 1903, leaving surviving nine adult children, all of whom are now living, and whose names are Jonas Harley, James Harley, Jacob Harley, Elmira Wisler, Alice Wisler, Kate Harley, Jennie Harley, Martha Fisher, and Charlotte Harley.

Catharine Bechtel, a deceased sister, had three children, Lydia Bitner, who is living and of full age, Louisa Roth, and Priscilla Landis. Lydia is the only one of the three who survived the testatrix. Louisa Roth was living at the date of the execution of the will, and died September 29, 1902, leaving issue surviving, three children, Lizzie Keim, of full age, Beulah Roth and Eddie Roth, both minors, of whose estates the Lehigh Trust Company is guardian. The other daughter, Priscilla Landis, was deceased when the will was executed, having died October 21, 1896, leaving surviving one minor child, whose guardian is the same Trust Company.

The decedent was possessed of certain personal estate, and two questions arise upon the distribution of the fund. One concerns the bequest of one-sixth of the residue of the estate to Jacob K. Harley,

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a brother of the decedent; and the other, the bequest of another one-sixth to the children of Catharine Bechtel, a deceased sister.

Jacob K. Harley died after the making of the will and in the life-time of the testatrix, leaving surviving issue, nine adult children, whose names are given above.

Under the acts of Assembly of May 6, 1844, P. L. 565, and of June 23, 1897, P. L. 200, the legacy to Jacob K. Harley has not lapsed by reason of his death, but is good and available in favor of his surviving issue. The one-sixth of the residue of the estate, therefore, is awarded to the said surviving issue in equal shares.

When the will was executed and the bequest of one-sixth of the residue was made to the children of Catharine Bechtel, a deceased sister, there were living two of her children, namely, Lydia Bitner and Louisa Roth. Priscilla Landis, another daughter of Catharine, was then deceased. As already stated, Lydia Bitner is still living, but Louisa Roth died on April 29, 1902, leaving issue surviving, three children. These children are entitled to participate in the distribution, and to receive their mother's share of one-half of the said sixth. The share must be divided between Lydia Bitner and the children of Louisa Roth. The legacy to Catharine Bechtel's children is a class one. When the will was executed the members of the class were Lydia Bitner and Louisa Roth; and the bequest to Louisa as a member of the class has not lapsed or become void by reason of her decease in the life-time of the testatrix, because she left issue surviving the testatrix, and the testatrix did not leave any lineal descendants: Act of July 12, 1897, P. L. 256.

In Harrison's Estate, 18 Pa. Super. Ct., 588, it was said: "The effect of the act of 1897 is to provide that where one is within a class designated by the testator as the object of his bounty, the devise or legacy to him shall not lapse by his death during the life-time of the testator; but the person so dying must have been a member of the class at some time in the period during which the will remained ambulatory, between the execution of the will and the death of the testator. . . . In case of the death of a member of the class during the life-time of the testator, his legal intention, prior to the act of 1897, was presumed to be that the issue of the person so dying should not participate in the distribution. When the devise is to children of brothers and sisters as a class, the act of 1897 goes only to the legal effect of the actual intention of the testator as declared

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by the words of his will. It is now presumed to be the legal intention of the testator that when a person who is actually within a class, dies, leaving issue, such issue shall take by substitution." The judgment of the Superior Court was affirmed by the Supreme Court on the opinion of Judge Porter: Harrison's Estate, 202 Pa., 331.

For the reason that Priscilla was never a member of the class, her son can not take by way of substitution, and therefore is not entitled to participate in the present distribution.

Court of Common Pleas of Montgomery County.

GEORGE PEACOCK VS. REILLY & WEBER.

Practice—New trial—When to be granted.

A new trial should not be granted merely because the verdict was not that which the court would have rendered on the same evidence.

Where the result shows that the jury have entirely mistaken the evidence, or where the estimate of damages appears to the court to be unwarranted by the testimony, or is reached on a wrong basis, a new trial can and should be granted.

MOTION for a new trial. No. 139, June T., 1904.

H. M. Brownback, Esq., for plaintiff.

Louis M. Childs, Esq., for defendant.

Opinion of the court by WEAND, J., December 5, 1904.

The reasons for a new trial urged by the defendants are that the verdict of the jury was "against the evidence," "against the weight of the evidence," and "against the law."

The claim of plaintiff was that his property was destroyed by sparks from defendants' locomotive.

The evidence was such that the jury could have found a verdict either way, according to how they found the weight of the evidence. The charge of the court, as we now review it, was favorable to defendant; but the jury found the facts in favor of plaintiff.

The rules and principles governing such cases will be found clearly set forth in the opinion of the Supreme Court in the case of Kelly vs. Traction Co., 204 Pa., 623: "Where questions of fact have

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been properly submitted to the jury on conflicting testimony, a verdict will not be set aside as against the weight of the evidence merely because the conclusion of the jury was not that which the trial court and the appellate court would have reached on the same evidence." In that case "the testimony was conflicting, and though to the mind of the trial Judge as well as to our own [the Supreme Court] it ought fairly to have led the jury to a different conclusion, these were questions of fact for the determination of the triers of fact and not for the court"; and the verdict was sustained.

In Flower vs. Wonghton, 12 Dist., 8, Judge Walling said: "I have reached the conclusion that it is better for one citizen to suffer injustice than for the court to establish a precedent of arbitrarily laying its hands upon the verdicts of juries," citing Railroad Co. vs. McKeen, 90 Pa., 122, where it was said: "The organic law secures to the people trial by jury as it was at common law, and nothing is more offensive in the administration of justice than for a Judge to usurp the disposition of the facts."

"In an action against a railroad company to recover damages for injuries to property caused by the emission of sparks from a locomotive, where the evidence shows that sparks of unusual size were emitted by the locomotive in question, the question of negligence is for the jury; and a verdict and judgment for the plaintiff will be sustained, although, in the opinion of the court, there was ample evidence to warrant a verdict for the defendant": Matthews vs. Philadelphia and Lake Erie Railroad Co., 20 C. C., 370. See also Moll vs. Zimmerman, 1 Woodward, 501; Brown vs. Railroad Co., 2 Id., 144; Keim vs. Maurer, 2 Id., 412.

Where the result shows that the jury have entirely mistaken the evidence, or where their estimate of damages appears to the court to be unwarranted by the testimony or reached on a wrong basis, a new trial can and should be granted. We find no such reasons in this case. We believe the jury were properly instructed on the law of the case, and although the theory of the defendant as to the origin of the fire might well have been adopted by the jury, their failure to do so, if the evidence warranted their finding, is not good ground for the interference of the court, even although we might have reached a different conclusion.

And now, December 5, 1904, the motion for a new trial is overruled and judgment is directed to be entered on the verdict on payment of the verdict fee.

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IN EQUITY.

JOHN S. MOREY, JR., VS. HOWARD BLACK AND CHARLES ALLEN.

Bowling-alley—Operation at unreasonable hours—Jurisdiction in equity to restrain nuisance.

A bowling-alley is not a nuisance *per se*, but becomes a nuisance when it prevents rest and sleep by its operation during unreasonable hours of the night.

Where the evidence clearly establishes a private nuisance giving out unnecessary sounds which disturb rest and sleep, equity may be invoked to keep the annoying sounds within reasonable limits.

Equity will enjoin the operation of a bowling-alley between the hours of the night ordinarily given to rest and sleep, where such alley is located in the neighborhood of buildings used as dwellings and stores.

FINDINGS of facts and conclusions of law upon final hearing before the court. No. 6, March T., 1904.

E. L. Hallman, Esq., for plaintiff.

Jacob V. Gotwalts and *Henry Freedley, Esqs.*, for defendant.

Opinion of the court by SWARTZ, P. J., September 29, 1904.

The bill was filed to restrain the defendants from conducting a bowling-alley in a building erected next to the plaintiff's drug-store and dwelling, because of the noises from the alley.

FINDINGS OF FACTS.

1. The plaintiff is the owner of a brick building fronting on Main street, in the borough of Royersford. He occupies the front of the building, first floor, as a drug-store, and the other rooms are used as his dwelling-house. He also owns the adjoining building on the west. This is occupied by his tenant, Miss Van Pelt, who uses it as a store and dwelling. The second story of this rented property is used for office purposes. The plaintiff, Dr. Morey, has occupied his drug-store and dwelling for the last eight years or more. His properties are located on the principal business street of the town, and in the section given to shops and stores. The rears or upper stories of these neighboring stores are largely used for dwelling purposes.

2. The defendants constructed a frame building one story high, with a brick front set on a stone foundation. The building other than its brick front rests on three rows of piers built of stone. These piers are eighteen inches square and about twelve feet apart. The

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ground ascends from the street front toward the rear of the building, so that the front piers are built about three feet high from the ground while in the rear the building sets on walls even with the ground or a little below the ground surface. There is an open space between the floor of the building and the surface of the ground, except that for twenty feet or more the rear of the building is flush with the surface of the ground or below it. This open space was enclosed by boards running from the floor to the ground. The sides and rear of the building are covered with boards, and the roof is made of slag. The studding is made of four-inch lumber. On the inside (including the ceiling) and against the studding there is a paper lining, and against this lining there is nailed a metallic covering, except that wooden wainscoting four and one-half feet high takes the place of the metallic covering immediately above the floor. The floor is of grooved yellow pine boards seven-eighths of an inch thick.

3. There are three bowling alleys, and the construction of the alley floor proper is in accordance with the methods, materials and appliances used in well constructed alleys.

4. The distance between the side of the plaintiff's building and the nearest side of the alley building is five feet eight inches on the Main street front and three feet two inches at the rear of plaintiff's building. The bowling-alley building has a depth of one hundred feet, while plaintiff's building is but fifty-six feet deep. There are two windows in the alley building on the side next to the drug-store. The window nearest to plaintiff's building is about twenty-five feet from the rear of the alley building; the other is still nearer the rear of the bowling-alley.

5. At the time the bill was filed the bowling started each day about nine o'clock in the morning and continued until twelve o'clock midnight. At the opening night it lasted until two o'clock in the morning. On some other nights it continued for a short time after midnight.

6. The loudest noises are caused by the impact of the ball with the pins. This noise is heard two or three squares away from the alley building. This is a sharp, penetrating sound, and differs from the other noises which occur from the rolling of the balls over the floors of the alleys, or from the dropping of the pins, or from the rolling balls as they are returned to the bowler. The sound made by the dropping ball and as it rolls along the alley is described as a

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sound resembling distant thunder. These noises are very annoying to the plaintiff, and interfere at night with the rest and sleep of himself, his wife, and his tenant Miss Van Pelt.

7. It is a disputed question whether the noises are so severe as to rattle the windows and vibrate the chairs and beds in the two properties of the plaintiff. It is also a disputed matter whether the noises interfere with ordinary conversation in these properties. That the sharp sound of the striking balls, the crashing noise of falling pins, and the rumbling sounds of rolling balls, seriously interfere with sleep, can not be denied, it is self evident from the location of the alley building, its frame construction with a hollow space underneath, its open windows within a few feet of plaintiff's dwelling, the number of the alleys, the distance that the sounds are heard, and the late hours that the bowling continues. These conditions render the home of the plaintiff at all times that the alleys are running an undesirable dwelling-place.

8. The plaintiff is in very bad health, and was in this physical condition before the alley building was constructed. He is nervous and excitable, and these noises disturb him more than they would a man in good health.

9. The plaintiff knew that the defendants were engaged in constructing a bowling-alley when the building was commenced. He made no remonstrance or objection at any time during the building operation. He was not familiar with bowling-alleys, and had no experience as to the sounds which proceed from them. The defendants expended about three thousand dollars in the construction of the building and the alleys.

10. Bowling is an amusement and recreation. Alleys are common in our cities and towns. The patrons of this form of recreation have increased in number during the past few years.

11. The location of the bowling-alley next to the property of the plaintiff has depreciated to some degree the market value of his store and dwelling; but it is not shown that it has interfered with his business or reduced his profits, except so far as interference with sleep necessarily interferes with the persons who occupy the house and attend to the business in the store.

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Morey vs. Black et al.

CONCLUSIONS OF LAW.

1. A bowling-alley is not a nuisance *per se;* but it may become a nuisance if located improperly, if constructed without using the reasonable precautions to deaden sound, if the noises are unnecessarily severe, or if it is operated during unseasonable hours.

2. If the noises of a bowling-alley are so severe and continuous as to disturb sleep and rest in its immediate neighborhood, thereby affecting health and ordinary comfort, it is a nuisance so far as its operations are carried on at unreasonable hours of the night.

3. Equity has power to abate a private nuisance, provided the fact of nuisance is admitted or not seriously disputed. Equity may be invoked to keep annoying sounds within reasonable limits.

4. The evidence in this case is so conflicting on all the questions raised by the plaintiff, except as to the unnecessary disturbance of sleep and rest, that equity will not at this time interfere beyond the abatement of the noises during the hours ordinarily devoted to sleep and rest.

5. A business may be conducted which will annoy others; but if it is a lawful business, conducted in a lawful manner and at a proper location, the injured party may be without redress, even if his property would sell for a somewhat higher price if such business were removed.

6. The plaintiff is entitled to an injunction restraining the defendants from operating their bowling-alleys as heretofore operated, the restraint to extend from fifteen minutes past ten o'clock in the evening to thirty minutes past seven o'clock in the morning.

DISCUSSION.

The character of the sounds issuing from this bowling-alley, the proximity of the building to the plaintiff's dwelling, the frame building with an open space underneath, the evidence of the inmates of the house and of others, these are all factors in the case, and show conclusively that the noises do disturb sleep and rest, and to such a degree that the annoyance is a nuisance so far as it continues during the hours ordinarily given to sleep and rest.

Sleep and rest are physical necessities, and no sufficient excuse is offered for the bowling during the late hours of the night. The defendants do not conduct a large manufacturing enterprise where

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night operations may be a necessity. It is said that bowling is a recreation and promotes health; but it is not claimed that the exercise gives increased benefits to the bowler if conducted during the hours nature demands for sleep. The books are full of cases where noises disturbing sleep and rest were enjoined or confined to reasonable hours. In Dennis vs. Eckhardt, 3 Grant, 390, a sheet-iron worker in a frame building a few feet from the plaintiff's dwelling was restrained from using his shop giving out noises between the hours of seven o'clock in the evening and six o'clock in the morning. In Burke vs. Myers, 10 W. N. C., 481, a manufacturer of stove polish was enjoined from operating his machinery between the hours of eight o'clock in the evening and six o'clock in the morning, because the noises prevented sleep in the adjoining building. In Dillon vs. States, 11 W. N. C., 18, a meat-chopping factory was restrained from operating between the hours of eight o'clock in the evening and eight o'clock in the morning. In Briggs vs. Vottler, 4 W. N. C., 272, a bowling-alley was enjoined because of the noises which disturbed the next neighbor.

It is argued that the alley is located in the business section of the town. This is true; but it does not follow that there is an absence of buildings used in part at least as dwellings. The properties on either side of the alley are occupied as stores and dwellings. It is not shown that this is a manufacturing centre given to noises. Stores are not necessarily noisy, to an extent that disturbs the occupants of adjoining buildings; at least, not after ten o'clock at night. In the small towns stores are usually occupied for living purposes. Families occupy the upper stories or rear portions of the buildings. The noises of this bowling-alley belong to a manufacturing locality rather than to the business centre of the town; especially so, if the bowling is to continue into the late hours of the night. The noises of the alley will find companionship in the factory section of the borough rather than in the business centre of the town. The borough is a manufacturing town, and a suitable location can be found for night noises without much difficulty and at little inconvenience to the patrons of a bowling-alley.

Whether the alley by reason of its noises is a private nuisance to the plaintiff in the business or working hours of the day is a question in dispute. It is only in a clear case that equity will act to order the abatement of an alleged nuisance. Where the matter is

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doubtful or the testimony of the witnesses is conflicting equity will not interfere. The plaintiff must first establish the nuisance by an action at law; prior thereto it is a case for the jury and not for the chancellor: Sparhawk vs. Union Passenger Railway Co., 54 Pa., 425; Raney vs. New Castle, 130 Pa., 546; Allegheny vs. Zimmerman, 95 Pa., 287; Mowday vs. Moore, 133 Pa., 598. This was the method pursued in James Gavigan vs. Refining Co., 186 Pa., 604.

It is one thing to disturb a neighbor by the ordinary prosecution of a lawful business, but quite another to unnecessarily annoy him with noises that prevent sleep and rest, and thereby bring about physical injury. Equity will interfere where without sufficient excuse such noises are produced in unreasonable or in unseasonable hours. The fact that the noises also disturbed the plaintiff in the day-time by reason of his physical condition is not of itself proof that the defendants are maintaining a nuisance. A man's nervous condition may be such that any slight noise will disturb him and aggravate his disease. If this were the sole test, an owner could not use his property for ordinary well recognized purposes. If a man can not endure the ordinary noises that are common to every business community, he should seek the quiet of a rural locality.

We do not mean to decide that the noises of the alley are the ordinary sounds found in a business community. We call attention to this feature of the plaintiff's case because his counsel lays much stress upon the fact that plaintiff is in a nervous physical condition.

It is said the plaintiff's property is injured in its market value, and that therefore he is entitled to equitable relief. This does not necessarily follow. The owner of a property may be without legal redress for the effect upon its desirability and market value from the proximity of an undesirable business. If, however, the business does the injury by reason of its improper location or unlawful conduct, the case stands in quite a different aspect: Robb vs. Carnegie Bros. & Co., 145 Pa., 324.

The defendants claim that an order closing their alleys before midnight will seriously affect their income from the business. A man can not justify an act injurious to his neighbor on the ground of its advantage to himself. A person can not go on and build extensive works and make a heavy expenditure of money for the exercise of a trade or business that will invade the premises of his neighbor, and then, when called upon to desist, turn around and say

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that to stop the business would involve him in ruin: Pennsylvania Lead Company's Appeal, 96 Pa., 116.

It may be well for the defendants to consider whether in an action at law they can sustain their location, and whether their building is so constructed that the noises which proceed from it give out no unnecessary volume of sound.

And now, September 29, 1904, after hearing and due consideration, it is ordered, adjudged and decreed that the defendants, their agents and employees, be restrained from operating their bowling-alleys, as heretofore conducted, between the hours of fifteen minutes after ten o'clock in the evening and thirty minutes after seven o'clock in the morning, and the prothonotary will enter a decree *nisi;* and unless exceptions are filed, as provided by the equity rules, he will enter a final decree as of course, the costs to be paid by defendants.

JOHN S. MOREY, JR., vs. HOWARD BLACK AND CHARLES ALLEN.

Bowling-alley—When equity has jurisdiction to abate noises.

Where the evidence is clear and beyond dispute that the noises from a bowling-alley disturb sleep and rest in a neighborhood occupied by dwellings or stores used in part as dwellings, equity has jurisdiction to enjoin the noises during the hours ordinarily given to sleep.

EXCEPTIONS to findings of facts and conclusions of law on final hearing before the court. No 6, March T., 1904.

E. L. Hallman, Esq., for plaintiff.

Jacob V. Gotwalts and *Henry Freedley, Esqs.*, for defendant.

Opinion of the court by SWARTZ, P. J., January 5, 1905.

The exceptions relate to a single matter. It is claimed that the right of the plaintiff is not clear, and that therefore the court has no jurisdiction to interfere with the business of the defendants.

Our findings are not attacked by any exception. It is true that under the exceptions that "the court erred in not dismissing the bill," counsel for defendants argue that the noises were not of such a character as to justify equity interference.

We found distinctly in our seventh finding of facts that "the sharp sound of the striking balls, the crashing noise of falling pins,

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and the rumbling sound of rolling balls, seriously interfere with sleep, can not be denied, it is self evident from the location of the alley building, its open windows within a few feet from plaintiff's dwelling, the number of the alleys, the distance that the sounds are heard, and the late hours during which the bowling continues." We also found as a fact that "the noise from the impact of the ball with the pins is heard two or three squares away from the alley building."

These facts we found from the established character of the noises that were not disputed, from the proximity of the building to the plaintiff's dwelling, and from the character of the defendants' building, being a frame structure with a hollow space underneath. We also found as a fact that the alley building was in a business part of the town where the houses or stores were used as dwellings. The alley building was not located in a manufacturing part of the town nor in a locality where noises were common. The alley was in fact located immediately adjoining plaintiff's dwelling and sleeping-room. If these are not the facts, then the defendants should have excepted specifically to the findings and not contented themselves with the general exception that the court erred in not dismissing the bill.

The case of McCaffery's Appeal, 105 Pa., 253, is not a parallel cause to the one now under consideration. In that case it was a question whether a newspaper publisher must give up his business. It was shown that without work at night he must abandon his business and building. We are not aware of any necessity to conduct a bowling-alley beyond the hour of the night fixed by us—fifteen minutes after ten o'clock. Recreation beyond that hour would seem to us an objection rather than a necessity. True, amusements and recreation are carried into later hours at times; but the defendants claim the right to do this continuously, each night, at the expense of the rest, comfort and sleep of their neighbors. Royersford is a borough in a rural district, and the plaintiff is "not a resident in the centre of a large city" where he must expect the noises and hum incident to the mechanical industries of a populous city. If the defendants wish to continue their sleep-disturbing noises, let them seek a neighborhood where these sounds find congenial company. We are sure that the thriving borough of Royersford can accommodate them without serious inconvenience to their patrons. There was no necessity to locate their frame building under a man's sleeping apart-

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ment. The brick dwellings and stores had possession of plaintiff's neighborhood long before the defendants located their bowling-alley. The fact that the frame building was placed on leased ground, and under a lease with a tenure of but five years, is pretty conclusive evidence that the frame structure is but a temporary erection to catch the bowling zeal while it may continue.

As long as our findings of facts stand, the injunction under the law must follow. We are not convinced of anv error in our findings, and we refer to our opinion upon the final hearing to support our legal conclusions.

And now, January 5, 1905, it is ordered, adjudged and decreed that the defendants, their agents, employees and workmen be enjoined from operating their bowling-alleys as heretofore conducted; this restraint and injunction, however, to extend from fifteen minutes after ten o'clock in the evening to thirty minutes after seven in the morning, and defendants are directed to pay the costs.

Abram C. Mott vs. Abram C. Mott, Jr.

Issue on sheriff's distribution of proceeds of sale—Insolvency and bankruptcy of defendant in the execution—Fraud, preferences.

Where the plaintiff in an execution files a denial of all the allegations for an issue, depositions should be taken, and on them the court will determine whether the issue should be awarded.

An issue can not be awarded on evidence so slight and insufficient that in case a verdict should be rendered thereon in favor of the petitioner, the trial Judge must set it aside.

The taking of a mortgage to secure an actual debt is not a fraud on creditors, although the mortgagee knew (1) that the effect would be to postpone other creditors; (2) that the debtor intended it to have that effect; and (3) although the mortgagee took the security to aid that intent as well as to protect himself.

The creditor will not lose his preference by bankruptcy proceedings where his mortgage is recorded more than four months before such proceedings are instituted, although he knew that the debtor was insolvent when he executed the mortgage, provided the transaction was honest.

Exceptions to sheriff's distribution of proceeds of sale and application for an issue. No. 21, December T., 1904.

Larzelere, Gibson & Fox, Esqs., for plaintiff.

Hillegass & Larzelere, Esqs., for defendant.

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Mott vs. Mott, Jr.

Opinion of the court by SWARTZ, P. J., May 22, 1905.

On April 29, 1904, Abram C. Mott, Jr., executed a mortgage in favor of his father, Abram C. Mott, to secure the payment of nine thousand eight hundred and nineteen dollars and seventy-five cents. This mortgage was recorded on May 5, 1904.

On September 8, 1904, a voluntary petition in bankruptcy was filed by the said Abram C. Mott, Jr. On September 17, 1904, the father commenced proceedings to foreclose his mortgage against the son. The property covered by the mortgage was sold by the sheriff on February 23, 1905, under proceedings on said mortgage. The sale realized $5,000. The sheriff filed his distribution, awarding to the mortgagee, Abram C. Mott, the sum of $4,880.22, being the proceeds of sale less the sheriff's costs.

The trustee in bankruptcy filed exceptions to this distribution by the sheriff. The exceptions are three in number: (1) The mortgage was without consideration; (2) the mortgage was fraudulent and given to hinder and delay the creditors of the mortgagor; (3) the mortgagee knew that the son was insolvent at the time the mortgage was executed. An application was made for an issue to pass upon these allegations. Depositions were taken in behalf of the trustee in bankruptcy to support his application for an issue. The mortgagee, Abram C. Mott, filed an answer in which he denies all the allegations contained in the exceptions. He shows the consideration for the mortgage, denies that the security was given to hinder and delay creditors, or that he knew that his son was insolvent at the time the mortgage was executed.

"Where the plaintiff files a denial, depositions should be taken; and on them the court will determine whether the issue shall be granted, subject to an appeal, if the issue is refused as provided by the act of 1846": Moore vs. Dunn, 147 Pa., 367.

The test, whether an issue should be awarded, is laid down in Hagy vs. Poike, 160 Pa., 522: "Alleged fraud must be established, either by direct proof or by clearly proved facts, sufficient to warrant a presumption of its existence. It is not enough to charge fraud, and prove in support thereof slight circumstances of suspicion only." "As a general rule, an issue should never be awarded on evidence so slight and insufficient that in case a verdict should be rendered thereon in favor of the petitioner the trial Judge would

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be bound to set it aside." Tested by these rules, the petitioner, in our opinion, has not made out a case for an issue.

Abram C. Mott was called for cross-examination, and he is the only witness who throws any light upon the inquiry whether there was a consideration for the mortgage. His evidence is not contradicted by any one. He produced the checks that were given to the son for the building of the house. There is no question whatever that the father paid for the ground as well as for the house that the son erected upon the premises. As we understand the allegations of the petitioner, he contends that the ground with the building thereon erected was a gift to the son, and that the mortgage was an after-thought and not contemplated when the money was furnished by the father. The father swears positively that from the very beginning, before the building was commenced, there was a verbal agreement with the son that the father would lend him the money to construct the house. The mortgage covered the money that went into the house; it does not include the cost of the ground. The latter was a gift from the father. How can we find that the money furnished for the house was a gift in the absence of any evidence from which such gift can be inferred and against the positive testimony of the father that it was a loan? The father bought the ground and paid for it. He intended to hold the title, at least for a time. When he concluded, from later information, that the scrivener made a mistake and deeded the ground to the son, the father was willing to let the matter stand. This, however, does not show that he was also willing to make a gift of the money that went into the house. He was, we think, in error when he concluded that the title was in the son. The father purchased the ground and paid for it, and there was no act on his part which authorized any one to place the title in the son.

The name of the grantee in the deed applied to the father just as well as to the son. If the father had claimed the title for the land and its improvements, we do not see how his claim could have been defeated. We think the intent was to provide a home for the son —such a home as would prove satisfactory to the son—but to retain full control of the title in the father. The father may not have been as careful in this transaction as he would have been with a stranger; but we can not expect parents to deal with their children at arm's length. Whether we are correct or in error in describing

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the true relation between the father and the son, is not material; the fact remains there is no evidence of a gift of the money to the son.

The father kept a careful account of the money that went into the house by stipulating that all his checks to the son for the house should be deposited in the bank under the "building account." He also preserved his checks for comparison with this account. That he furnished the ninety-eight hundred dollars to the son can not be denied; and we can not hold this sum to be a gift in the absence of sufficient facts to show a gift, and under the positive declaration of the father that it was not a gift but a loan.

The mortgage was executed and recorded more than four months before the bankruptcy proceedings. Even if the father secured a preference and the son was known to be insolvent, this will not defeat the father's mortgage if the transaction was otherwise honest: Matthews vs. Westphal, 48 Federal Reports, and cases there cited.

Was there fraud? Did the father take the mortgage to hinder and delay creditors of the son? In Shibler vs. Hartley, 201 Pa., 286, our court said: "It may be considered as the established result of our cases that if a creditor takes a judgment, or conveyance, or payment in any form, to secure an actual debt, the transaction will be valid against other creditors, although he knew (1) that the effect would be to postpone the others; (2) that the debtor intended it to have that effect; and (3) although he took it to aid that intent as well as to protect himself. The criterion is not the effect but the fraudulent intent. Without that the transaction can not be impeached. A corollary of the foregoing rule is that where there is an actual debt the jury can not be permitted to infer a fraudulent intent by the mere fact of payment or preference given." In the case before us there is no evidence of any intent other than a purpose on the part of the father to protect his claim. We can not infer fraud fromfacts which are equally referable to an honest purpose or intent.

The trustee in bankruptcy attempted to interfere with the proposed sheriff's sale on the mortgage. An application was made to the United States District Court. The Judge who heard the case declared to the mortgagee, "If you will file a stipulation agreeing not to go against the bankrupt estate on any claim on your bond for the difference between what the real estate brings and the judgment, I will not restrain the sale." Such stipulation was filed by

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the mortgagee in that proceeding. If the evidence taken before us in support of the application for an issue is true, so far as Mr. Mott speaks of the insolvency of his son, it may be that he could prove his claim without giving up his preference. Under the proceedings commenced by the trustee in bankruptcy, the mortgagee was induced to give up any claim he may have against the estate of the bankrupt. That the Judge who heard the case intended that the mortgagee should have the full benefit of his preference, if he filed the stipulation, is quite evident from the language of the court; and it would seem unfair that the trustee who secured this waiver should now be allowed to take from Mr. Mott all the benefits of his preference.

The evidence before us is not in our opinion sufficient to justify us to award an issue, and the exceptions are dismissed and the application for an issue is refused.

LETTIE R. WILLOUGHBY ST. JOHN VS. ANNIE E. STAPLES.

An absolute estate will not be reduced by a codicil which has no certain and definite meaning.

The clearly expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may justify either of two opposite interpretations.

Where a will contains a clear and unambiguous disposition of property, real or personal, such a gift is not allowed to be revoked by doubtful expressions in a codicil.

CASE stated. No. 77, June T., 1905.

E. G. Hamersly, Thomas P. Gates and *Frank P. Prichard, Esqs.*, for plaintiff.

F. G. Hobson, Esq., for defendant.

Opinion of the court by WEAND, J., May 22, 1905.

Frank J. St. John died seized of certain real estate, and leaving a last will reading as follows:

> "I give devise and bequeath unto
> my wife Lettie R. Willoughby
> St. John all my property of
> whatsoever kind for her use

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absolutely feeling that she will
do with it for the best interests
of her self and Florence my daughter
My wife to be sole executrix.
Witness my hand and seal
this 17th day of April 1896 and
Arciedo Willoughby St John my daughter
Witness Frank St John
Chas Schmoele
Emma M. Koch

Just the same as
you Letty &
Florence
F Jay St John
11-21-98

The words "and Arciedo Willoughby St John my daughter just the same as you Letty and Florence" were added in lead pencil (and occupied the same position as above written) as a codicil, and so proven and admitted to probate.

Arciedo, the daughter, was born July 2, 1896.

The question under the terms of the case stated is, What estate does Lettie R. Willoughby St. John, the widow, take under the will and codicil?

The rule of construction as applied to this case is clearly laid down in Mickley's Estate, 4 Pa. Super. Ct., 550, as follows: "The first object in the construction of a will is to ascertain the intention of the testator, as was well said by Bailey, J., in Wickham vs. Turner, 2 D. & R., 398 (16 E. C. L., 96): 'We certainly are not empowered to make a will for a testator; but we are empowered, and it is our duty, to construe the will he has made so as to give effect to that which upon the whole may reasonably be taken to have been his intention and object. We are to act either upon express words or upon a manifest intention; and where the language is at all doubtful in one part we are to construe that part by reference to and comparison with former parts (or latter) as a key to explain the particular word which gives rise to the doubt entertained.'" In reaching a conclusion as to the intention of the testator, as Lord Kenyon has forcibly expressed it, "You are to look into all the four corners of the will." We must not forget, however, that "the question in expounding a will is not what the testator meant but what is the meaning of his words": Bruckman's Estate, 195 Pa., 363.

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To our minds the intention of the testator and the plain meaning of his words lead to the conclusion that he intended to give his wife an absolute estate in all his property. Unquestionably under the original will Mrs. St. John took an estate in fee by words aptly expressed. The testator did not overlook his then only daughter. His intention and words expressing his plain meaning under the original will are not disputed.

After the making of the will another daughter was born, and the testator evidently knew that unless a new will was made this circumstance would defeat his purpose of giving his wife his entire estate. Either this knowledge or his fatherly affection induced him to add the codicil, which plainly means that Arciedo is to have the same interest as already given to the wife and Florence. To the wife had been given the whole estate with the feeling that the mother would use it for the best interests of her children. Any other reading would divide the estate into three parts, if Arciedo was to have the same as the widow and Florence, or to have an equal share with the mother omitting Florence. His use of the words "as you Letty and Florence" shows a request to the wife to use the estate for the best interests of both daughters, and shows no intention of reducing the estate previously given to her. To cut down the absolute estate previously given there should be some clear intention expressed or words used from which such intention can be inferred.

In Whelen's Estate, 175 Pa., 23, Judge Penrose said: "A codicil is to be interpreted in the light of the circumstances surrounding the testator at the time of its execution, and of the reasons which induced it—especially when they appear on its face; and as its purpose ordinarily is merely to modify or add to, and not revoke, it is only permitted to change the will to the extent that it is inconsistent with it." "It is the established rule," 1 Jarmon on Wills, 160, "not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil." In Quincy vs. Rogers, 9 Cushing, 291, it was held that a codicil and will are "to be construed in reference to each other, to determine from change of circumstances or otherwise what it was intended to alter and what to retain and confirm, the codicil changing the will so far only as is manifest."

In Phillips's Estate (No. 1), 205 Pa., 504, Mr. Justice Brown said: "It is said in 1 Redfield on Wills, 438, that 'plain and distinct

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words are only to be controlled by words equally plain and distinct.' Such words, to have a controlling effect, must at least possess a definite and certain meaning. The clearly expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may justify either of two opposite interpretations. Such directions are to be construed as to support the testator's distinctly announced main intention": Sheetz's Appeal, 82 Pa., 213. The same principle is laid down in Jarmon on Wills (6th ed.), 145, thus: "Where the will contains a clear and unambiguous disposition of property, real or personal, such a gift is not allowed to be revoked by doubtful expressions in a codicil."

If we adopt the construction contended for by defendant, what is "the certain and definite meaning" of the codicil so as to determine the estate to be given to Arciedo? Is she to have one-half and the widow the remainder? Or shall the whole estate be divided into three equal parts? in either case reducing the interest previously given to the wife. The circumstances of the case we think rebut either construction.

When the testator made his will he had but one child, and evidently thought that his whole estate was not more than sufficient for the support of his widow. With the birth of another child her wants increased, and it is not conceivable that he would then give her less than before. Or was his affection for his new-born child greater than that for his first-born, that he should prefer the one to the other?

The construction which we adopt is the only one consistent with the object to be attained by the testator and of the plain meaning of his language.

For authorities showing that no trust was created by the words "feeling that she will do with it for the best interests of herself and Florence my daughter," see Boyle vs. Boyle, 152 Pa., 108; Heck's Estate, 170 Pa., 232; Cressler's Estate, 161 Pa., 427.

Considering all the circumstances, the intention of the testator, and the proper effect to be given to the words used, both in the will and codicil, we are of opinion that Lettie R. Willoughby St. John is possessed of an estate in fee in the lands mentioned and described in the case stated.

And now, May 22, 1905, judgment is directed to be entered in favor of the plaintiff with costs of suit.

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JAMES R. BOOTH VS. ANNE THOMSON, FRANK GRAHAM THOMSON AND CHARLES THOMSON.

A contemplating purchaser at a sheriff's sale is bound by all the notice that is disclosed by the record of the proceedings leading up to the sale. Statements in the proceedings that the lien of the mortgage in suit was divested by a former sale can not be ignored. Where the statements can be verified by following up the references found in the proceedings, the purchaser can not shut his eyes and say "I will not turn back to the records from which these facts are drawn."

EXCEPTIONS to findings and conclusions of the court. No. 16, December T., 1903.

Larzelere, Gibson & Fox, Esqs., for plaintiff.

Evans & Dettra, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., May 13, 1905.

In our findings and conclusions we think it was clearly established that the mortgages were divested by the sale on the mechanic's liens. This followed for several reasons:

First. The mortgagees by their proceedings at this sheriff's sale and their claim before the auditor appointed to make distribution of the proceeds of sale demanded a finding by the auditor that their mortgages were divested. The auditor so found, and his report was confirmed by the court.

Second. An examination of the records even at the time of the first sheriff's sale would have disclosed that the mechanic's liens antedated in their lien the mortgages, under the ruling in Reynolds vs. Miller, 177 Pa., 168.

Counsel for the defendants admits, as we understand, that as to the mortgagees the liens of their mortgages were divested by the sheriff's sale on the mechanic's liens; but he contends that the purchaser at the second sheriff's sale was without any record notice of this fact, and that as to him the sale passed a good title clear of all incumbrances.

The purchaser was bound by all that the records disclosed, so far as there was anything to direct his attention to these disclosures. He claims there was nothing in the mortgage foreclosure to direct his attention to the true facts. In this, we think, he is in error.

There was an application by J. Wister Evans, the purchaser, to open the judgments upon the mortgages. This application declares that the premises were sold at sheriff's sale on February 23, 1893, under mechanic's liens which divested the mortgages, and that the

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said J. Wister Evans became the purchaser at said sale. An answer was filed to this application, which admitted that J. Wister Evans became the purchaser of the premises at sheriff's sale, but conveyed the same to James R. Booth on May 10, 1894, and that the deed to said Booth was recorded at Norristown, in the recorder's office, on May 18, 1894. In passing upon this application the court said, inter alia, "the auditor found that the mortgages were divested by the sale. . . . The auditor's report was confirmed by the court, and we can not allow the process of the court to be abused by the mortgagees when our attention is called to the decree of the court by the party against whom the judgments were entered on the mortgages, being the same mortgages we heretofore declared divested by the sheriff's sale."

Surely, where a contemplating purchaser finds statements like these he can not shut his eyes and say "I will not turn back to the records from which these facts are drawn."

The foreclosure proceedings told him that J. Wister Evans was the purchaser at a prior sheriff's sale of the same premises described in the mortgage. If the defendants before purchasing had turned to that deed the whole matter would have been made plain to them. They would have found the distribution of the auditor wherein the facts are all disclosed. These foreclosure proceedings revealed the date of the former sheriff's sale as well as the name of purchaser. From this information it was an easy matter to find the record of the sheriff's deed. Or they could have examined the deed from J. Wister Evans to the plaintiff Booth, for they were informed by the proceedings on the mortgage that this deed was recorded at Norristown on May 18, 1894. There would have been no difficulty whatever in running back the title from this Evans deed. In doing so the whole proceedings under the first sheriff's sale would have disclosed themselves. They would have learned the basis upon which the court declared that the mortgages were divested by the prior sale. It would have disclosed to them the reason for our conclusion that the foreclosure proceedings constituted an abuse of legal process. When the court declared that these mortgages were divested by a former sale, surely this was sufficient to impose the duty of a careful examination of the records upon any one who contemplated buying the title that would be conveyed to the purchaser at the second sheriff's sale.

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The defendants were not innocent purchasers without notice. If they were without notice, it was due to the fact that they failec to examine the record when it was their duty to make such an examination.

The exceptions that we admitted certain irrelevant evidence as to the notice given at the second sale, as to the tax receipts and as to the proofs when the work was commenced in the construction of the buildings, can not help the case of the defendants, for our judgment is not based on any of these matters. We rely on the record evidence alone to show that the defendants have no title as against the plaintiff, who bought all that vendee at the first sale secured.

And now, May 13, 1905, the exceptions are dismissed, and the prothonotary will enter judgment for plaintiff and against defendants for the premises described in the plaintiff's writ to the sheriff.

THE BURGESS AND TOWN COUNCIL OF THE BOROUGH OF BRIDGEPORT vs. RICHARD H. BATE, JOHN S. BATE AND GEORGE STEES, ADMINISTRATORS OF WILLIAM T. BATE, DECEASED.

Suit by borough for paving and curbing—Action of assumpsit can be maintained—Sufficiency of statement.

An action of assumpsit is a proper remedy against a property owner in a suit by the borough to recover a bill for paving and curbing.

Paving foot-walks falls within the right of the borough to enforce police regulations. Assumpsit is also a remedy provided by the act of May 16, 1891, P. L. 75. Whether the borough can recover the costs of guttering outside of the pavement and along the curb line not decided.

Where the action is based upon a special act of Assembly or upon an ordinance of the borough, the statement should refer to such act and recite such part of the ordinance that is material to disclose the character of the claim and the liability of the defendant under the ordinance.

DEMURRER to plaintiffs' statement. No. 113, March T., 1905.

I. P. Knipe and *H. I. Fox, Esqs.*, for plaintiffs.

William F. Meyers, Esq., for defendants.

Opinion of the court by SWARTZ, P. J., May 22, 1905.

That the plaintiff borough has the right to sue in assumpsit to recover from a property-owner the costs of curbing and paving foot-walks is clearly set out in the act of February 27, 1851, P. L. 115, incorporating the borough of Bridgeport. The nineteenth section of this act declares: "And the said burgess and town coun-

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cil are hereby authorized to collect the charges on land for curbing and paving foot-walks and for relaying and repairing said pavements and curb stones by bringing suit against the owners of said lands." There is a further provision in the same section which declares, "and the better to secure the payment of the same, every lot or piece of land in said borough shall be subject to a lien for all expenses for work done and materials used in and about the curbing, paving and repairing." But the authority to lien is not the exclusive remedy whereby the costs of curbing and paving may be collected from the property-owner. The remedy by lien is in aid of the action of assumpsit.

The eighteenth section of the act of 1851, incorporating the borough of Bridgeport, vests in the burgess and town council the right to exercise such jurisdiction over the streets as the public convenience and the interests of the borough may require. Paving and curbing the foot-walks falls within this police regulation, and the liability of the property-owner for the costs of the same may be enforced by an action in assumpsit: Pittsburg vs. Daly, 5 Pa. Super. Ct., 528; Philadelphia vs. Pennsylvania Hospital, 143 Pa., 367.

Again, the act of May 16, 1891, P. L. 75, declares in the eleventh section of the act that the costs of paving and curbing may be collected from the property-owner by an action of assumpsit. This act applies to all municipal corporations of the commonwealth: Verona Borough vs. Railroad Company, 187 Pa., 358.

We think the statement should contain a reference to the special act of Assembly if the plaintiff claims under that act. So far as the claim is made under an ordinance of the borough, so much of the ordinance should be recited as may be material to disclose the character of the claim and the liability of the defendant under the ordinance. The statement is silent as to all these matters.

The right to collect the costs of laying gutters is not challenged by the demurrer. The contention is that such costs must be collected by means of a municipal lien. Whether the borough can collect the costs of guttering is not free from doubt. This can be determined when the plaintiff files the amended statement or when the ordinance is presented under which the plaintiff alleges the liability arises. Perhaps it is best to dispose of this question when all the facts are produced at the trial of the issue.

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And now, May 22, 1905, the second cause of demurrer is sustained in accordance with this opinion. The plaintiff has fifteen days in which to file an amended statement.

EDWARD J. GARDNER AND JOHN H. GARDNER, TRADING AS F. GARDNER'S SONS, VS. YELLIS C. FREED AND ATMORE LOOMIS, TRADING AS ROYERSFORD FOUNDRY AND MACHINE COMPANY.

Promissory note—Irregular endorsement—Effect of agreement to endorse.

An agreement to endorse notes for others means a regular endorsement, in the absence of legal evidence of any different contract.

An agreement to endorse a note is not a promise to answer for the debt of another.

MOTION to take off non-suit. No. 56, October T., 1904.

Evans & Dettra, Esqs., for plaintiffs.

E. L. Hallman and *Henry Freedley, Esqs.*, for defendants.

Opinion of the court by WEAND, J., May 15, 1905.

The suit is on three promissory notes drawn by George P. Steel Co. to the order of F. Gardner's Sons, and endorsed by defendants before endorsement of the payees. The notes are dated November 24, 1900.

Being an irregular endorsement the defendants are not liable unless made so by an agreement in writing under the act of April 26, 1855, P. L. 308.

The George P. Steel Co. being indebted to the plaintiffs in sixteen hundred dollars, entered into an agreement by which they were to pay plaintiff's five hundred dollars in cash and give their three notes for balance, the notes to be endorsed by the Royersford Foundry and Machine Co., who were parties to the written agreement.

Plaintiffs had been making castings for George P. Steel Co., and part of the agreement was that George P. Steel Co. and defendants were to purchase from plaintiffs the trimmings, fixtures, fittings and castings on hand. The notes were not given on that account. It is claimed by plaintiffs that the agreement in writing, of defendants to endorse the notes, is sufficient to hold them liable. As was said by Judge Sharswood in Gilbert vs. Finkbeiner, 68 Pa.,

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243: "Nobody ever doubted that when a man puts his name on the back of negotiable paper before the payee has endorsed it, he means to pledge in some shape his responsibility for the payment of it." "But in the absence of legal evidence of any different contract, he assumes the position of a second endorser, and that to render his engagement binding as to any holder of the note the implicit condition that the payee shall endorse before him must be complied with so as to give him recourse against such payee."

The written agreement relied upon is no more than what is assumed in every agreement to endorse a note; whilst defendants did agree to endorse the notes, the law will not hold them liable unless the endorsement is one fixing a legal liability. It has no more virtue than a verbal promise or than the act of endorsement itself.

If plaintiffs wanted the defendants to be primarily liable they had it in their power to have the notes properly prepared. Having themselves prepared the notes, and having accepted them, they must be assumed to have recognized the position and liability of defendants as second endorsers. Defendants have literally complied with their agreement by their endorsements, and that is all they contracted to do. The last clause in the agreement expressly reserves the right of plaintiffs to look to the original debtors for the collection of the accounts, thus showing that defendants had not assumed the liability for the debt: Maule vs. Bucknell et al., 50 Pa., 39.

The written agreement which the law requires is one to pay the debt of another; an agreement to endorse a note simply, is not sufficient under the adjudicated cases.

And now, May 15, 1905, the motion to take off the non-suit is overruled.

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IN EQUITY.

MARTIN AND WILLIAM H. NIXON PAPER COMPANY AND THE PHILADELPHIA PAPER MANUFACTURING CORPORATIONS, ORGANIZED UNDER THE LAWS OF THE STATE OF PENNSYLVANIA, AND JOSEPH E. RAYNER VS. JOSEPH H. MAURER.

A magazine for the storage of dynamite and powder located on a lot of ground at the intersection of two public roads extending to the line of a railroad company, and immediately opposite and across the Schuylkill river where are located two paper-mills employing five hundred hands, will be enjoined.

MOTION for preliminary injunction. No. 3, March T., 1905.

C. Henry Stinson, Esq., for plaintiffs.

Wm. F. Dannehower, Esq., for defendant.

Opinion of the court by WEAND, J., May 1, 1905.

Defendant's building used for the storage of dynamite and powder is located on a lot of ground at the intersection of two public roads, and extending to the line of the Philadelphia and Reading railway. Immediately opposite and across the river are located Nixon's paper mill, 564.3 feet distant; and the Philadelphia Paper Co.'s mill, 485.4 feet distant. Each of these establishments employ about 250 hands. About 1,200 feet distant on the public road are nineteen dwelling-houses.

At the time complaint was made to defendant, he was using an old store building having four windows, from which the panes were broken, but protected by wire screens through which the contents of the building could be seen. He had no one in attendance, and lives himself in East Manayunk, about a mile distant. He has since erected a frame building, 10 by 10 feet, to be covered with a sheet iron roof and banked around, in which the dynamite and powder is hereafter to be stored. Dynamite may not in itself be a dangerous agent, but accidents will occur through negligence and other means. The proximity of this building to the public road and to the mills, houses and railway, makes it in our opinion an entirely unsuitable place for the purpose intended. The consequences of an explosion to the manufacturing places opposite, and to the people and houses in Manayunk, and to travel on the public roads, would be of the most serious character, and we ought to take no chances. Not only the plaintiffs in the bill but the public who use the roads are entitled to protection. We think the decision of

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Judge Sharswood in Wier's Appeal, 74 Pa., 230, particularly appli cable to this case.

And now, May 1, 1905, a preliminary injunction is granted as prayed for restraining the defendant, Joseph H. Maurer, his agents, servants or employees from erecting, establishing or maintaining in any manner a magazine or storage-house for gun-powder or dynamite or other explosives in and upon the premises now occupied and used by him for that purpose at the corner of the River road and Mary Walker's or Roberts' road in Lower Merion township. This decree not to be operative until May 8, 1905. Plaintiff to give security in five hundred dollars.

TITUS SANDT VS. NORTH WALES FOUNDRY COMPANY.

The party charging negligence does not show it by showing that the machinery was not in common use. If it should be so held, the use of the newest and best machinery, if not yet generally adopted, could be adduced as evidence of negligence: Smith vs. Traction Co., 202 Pa., 54.

It is not permissible to guess at the cause of an injury, and assume that it was something for which the defendant was responsible: Reese vs. Clark, 146 Pa., 465.

Plaintiff alleged that his injury was caused by the "slipping of a hook"; but as this might have been caused by the improper placing of chains on the hook by a fellow-workman or by the ramming of plaintiff, and as there was no specific evidence of what caused the hook to slip, a non suit was ordered.

MOTION to take off non-suit. No. 113, October T., 1904.

G. Herbert Jenkins, Esq., for plaintiff.

Francis K. Swartley, Esq., for defendant.

Opinion of the court by WEAND, J., April 3, 1905.

Plaintiff was employed about the moulding-room of defendant's foundry, and an accident having occurred by which he was injured he has brought this suit to recover damages, alleging negligence on the part of the defendants in not providing proper machinery and in not instructing him.

A "cope" is part of the double sand-filled flasks within which the pattern has been placed and the casting made. After the cast is completed it is necessary to clean out the sand from the "cope," and this is done by ramming it out with an iron or wooden bar. The cope is hoisted by a crane and suspended by chains to a hook,

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and the sand is then punched or rammed out. This was the work in which plaintiff was engaged when the accident occurred. The cope "wobbled," or tilted, slipped off the hook, and struck plaintiff on his foot, injuring him severely. It had "wobbled," or tilted, frequently before, and plaintiff had been engaged in the same work for a number of days previously, having abundant opportunity to observe the operation. It was ordinary labor, requiring no skill or instruction. The accident occurred at a time when the plaintiff and another were ramming out the sand, causing the cope to tilt and slip from the hook.

No witness to the accident could tell what caused the slipping off the hook, and three theories can be assigned:

1. That the chains were improperly placed upon the hook before the cope was raised.

2. That the ramming or punching of the sand, by the plaintiff and another, caused the "wobbling" or tilting and the slipping of the chain from the hook.

3. That the hook was too small and cope chains too short.

From the evidence one theory was as plausible as another, and the jury would have been left to guess.

As the accident itself gave no cause of action, plaintiff was required to prove negligence or omission of duty on the part of defendant. With the well known sympathy of juries for injured employees and consequent verdicts against corporations, the court is compelled to enforce the law that negligence must be shown and not conjectured.

If the accident was caused by reason of the improper placing of the chains on the hook by a fellow-workman, or by the ramming of plaintiff, there could be no liability on the part of the defendants; and as the accident could be attributed with equal propriety to either of these causes, the case is ruled by Alexander vs. Pennsylvania Water Company, 201 Pa., 252, and Price vs. Lehigh Valley Railroad Company, 202 Pa., 176.

The evidence as to the insufficiency of the hook was not sufficient to convict defendants of negligence. It had been frequently used before, and had answered its purpose; and although it might have been larger or of a different shape, this was a matter of judgment. The witnesses who spoke of its defects or insufficiency had used others of different make or size; but as there was no standard

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hook or method of attaching the cope to the crane chain, this testimony was of little importance. Besides, it was entirely theoretical. "The party charging negligence does not show it by showing that the machinery was not in common use. If it should be so held, the use of the newest and best machinery, if not generally adopted, could be adduced as evidence of negligence": Smith vs. Traction Co., 202 Pa., 54; Cunningham vs. Fort Pitt Works, 197 Pa., 625; Titus vs. Bradford et al., 126 Pa., 618.

The language of Mr. Justice Fell in McClain vs. Henderson, 187 Pa., 283, may be applied to this case: "The testimony of the witnesses who saw the accident which resulted in the death of the plaintiff's husband, fails to furnish any explanation of its cause from which an inference of negligence on the part of the defendant could arise. The attempt at the trial seems to have been not to develop the facts immediately connected with the occurrence but to establish by expert testimony a theoretical cause which at most was one of many equally probable causes." In many respects the case cited is analogous; and there, as here, "it did not appear whether the dropping of the bucket was caused by overloading, by defects in the machinery, or by unskillful management."

The plaintiff was about forty-four years of age, and had been in the employ of defendants for about eleven months. He had been engaged in the particular work at the crane apparatus for twenty-six days prior to the accident, and had assisted in raising the cope during that period seventy-eight times—*i. e.*, three times each day; that he had assisted in freeing the cope from sand once each day during said period. During this time the apparatus was in the same condition as at the time of the accident. There was no latent defect in the apparatus, and nothing broken.

If to the mind of plaintiff, who was engaged in the work, there was no defect in the machinery, how could his employers be any wiser? If it was dangerous, why did he continue in the work? His eyes showed him everything that was necessary to be known as regards the safety of the operation. Instruction was not necessary, and any ordinary laboring man could have done the work. When the cope tilted it was because overloaded, improperly balanced, or punched too hard, and this should have put plaintiff on his guard; and if for any of these reasons the chains slipped—the most plausible theory—the defendants are not liable.

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If plaintiff's witnesses are to be believed, the danger was obvious, and he assumed the risk of employment. According to his own testimony, every time "we were ramming out the cope shook and the chains spread one time like the other."

"A workman is under no obligation to continue working in a dangerous place of employment. If he does so, with every opportunity to know the danger, he can not excuse his own want of care in failing to notice and guard against it by alleging that his employer promised to do this, and had failed to observe his promise": Reese vs. Clark, 146 Pa., 465.

"Where an accident results from an unforeseen cause not discoverable in advance of its occurrence, with no visible defect in any part of the machinery, and no knowledge of any defect on the part of the men who were constantly using the machinery or of the employer, the accident is one of the ordinary risks of the employment which the servant takes upon himself": Bradbury vs. Kingston Coal Co., 157 Pa., 231; O'Dowd vs. Burnham, 19 Pa. Sup. Ct., 464.

We are of opinion that the evidence failed to disclose any defect in the appliances used; and if it does, that the defect and danger must have been seen by plaintiff; and also that as the accident could with equal propriety be attributed to the force used by the ramming or improperly loading, or placing of the chains upon the hook, that the verdict of the jury would have been a mere guess as to the real cause.

And now, April 3, 1905, the motion to take off the non-suit is overruled.

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Orphans Court of Montgomery County.

Estate of Reuben D. Umstead, Deceased.

The act of July 10, 1901, P. L. 639, enlarges the capacity of an illegitimate to inherit.

An illegitimate child can inherit through its mother from maternal uncles and aunts, and more remotely on the mother's side under the intestate law.

Rees's Estate, 166 Pa., 498, is no longer authority.

No. 16, November Stated Court, 1904.

Freas Styer, Esq., for the estate.

William F. Dannehower, Esq., for David Simmons.

Opinion of the court by Solly, P. J., June 10, 1905.

The decedent died on August 7, 1903, intestate, unmarried, and without issue. He left to survive him as his heirs-at-law several sisters and brothers and the issue of two deceased brothers. It appeared that Noah Umstead, one of the brothers, who died in his life-time, left surviving him issue three children. He had another child, Sallie Slemmer, who at her death left issue a daughter. We also found that he had another daughter, Eliza, who was deceased, but who left to survive her an illegitimate son, David Simmons. We held that he was not entitled to participate in the distribution of the estate. The fund was divided into six capital shares and awarded under the statute of distributions to the surviving brothers and sisters and the lawful issue of those deceased.

At the rehearing David Simmons appeared by counsel and claimed a share of the estate as one of the heirs-at-law. If he were the legitimate child of Eliza, one of the daughters of Noah Umstead, his right to a portion of the estate as representative of his mother would be beyond question. The act of April 27, 1855, would make him an heir, and he would inherit by way of representation. The decisions of the Supreme Court, which we have cited in the adjudication, construing the act of 1855, settle the law that the grandchildren of brothers and sisters take by representation. We held that being an illegitimate he was not an heir of Reuben Umstead, and that he could not inherit through his mother any portion of this estate. As authority for our ruling we cited Rees's Estate, 166 Pa., 498.

His counsel refers to the act of July 10, 1901, P. L. 639, 3 P.

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& L. Dig., 1061, and claims that under this act he should be admitted as an heir and distributee of this estate.

Prior to the act of April 27, 1855, P. L. 368, an illegitimate was a *nullius filius*, both under the common law and our own statute of April 8, 1833, P. L. 315. The act of 1855 was the first enactment by which an illegitimate was recognized as entitled to inherit. That act gave capacity to illegitimate children and their mother to take or inherit personal estate from each other as next of kin and real estate as heirs in fee simple; and it provided that they should take and be known by the name of their mother. But the act did not legitimate illegitimates: Steckel's Appeal, 64 Pa., 493. Nor did it enable illegitimates to inherit from each other: Woltemate's Appeal, 86 Pa., 219. No doubt by reason of the decision in that case the act of June 5, 1883, P. L. 88, 1 P. & L. Dig., 2420, was passed, which provided that illegitimate children born of the same mother, and leaving surviving neither mother nor issue capable of inheriting, should have capacity to take or inherit personal property from each other as next of kin and real estate as heirs in fee simple, in the same manner as children born in lawful wedlock. After the passage of this act the law then stood that illegitimates could inherit from their mother and from themselves and their mother from them. But the Legislature had not gone so far as to enact that they could inherit through each other; the capacity was to take or inherit from each other.

They could not inherit from a grandmother. To enable them so to do the act of June 14, 1897, P. L. 142, 3 P. & L. Dig., 349, was passed. It is an amendment of the third section of the act of 1855, and provides that illegitimate children shall take and be known by the name of their mother, and they and their issue and their mother and grandmother shall respectively have capacity to take or inherit personal estate from each other as next of kin and real estate as heirs in fee simple.

Then came the act of June 10, 1901, P. L. 551, 3 P. & L. Dig., 1061, which excluded the grandmother and provided that all the children born from the same mother, whether legitimate or illegitimate, and dying without leaving children or others entitled to inherit under the then present laws of the commonwealth, should have capacity to inherit from each other to the exclusion of the grandmother of the illegitimate child or children. So that prior to the

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act of June 10, 1901, while an illegitimate could inherit from his mother, his children, brothers and sisters, legitimate or illegitimate, and his grandmother, he could not inherit through them, nor from uncles and aunts, nephews and nieces, or more remote collaterals on his mother's side.

Does the act of July 10, 1901, P. L. 639, 3 P. & L. Dig., 1061, enlarge the capacity of an illegitimate to inherit, so that he can now inherit personal estate through his mother from a granduncle? The title of the act is "To regulate and define the legal relations of an illegitimate child, or children, its or their heirs, with each other, and the mother and her heirs."

The first section provides that the common law doctrine of *nullius filius* shall not apply as between the mother and her illegitimate child. But she and her heirs and it and its heirs shall be mutually liable one to the other, and shall enjoy all the rights and privileges one to the other, in the same manner and to the same extent as if the child had been born in lawful wedlock. There is nothing in this section which enables a child to inherit through its mother.

The second section provides, however, that the mother, her heirs and legal representatives, and the illegitimate, its heirs and legal representatives, shall have capacity to take or inherit personal estate from or through each other as next of kin and real estate as heirs in fee simple, under the intestate laws of this commonwealth, in the same manner and to the same extent, subject to the distinction of half bloods, as if the illegitimate had been born in lawful wedlock.

The third section provides that each illegitimate shall be considered as of the half blood to each and every other child of said mother, legitimate or illegitimate.

The Legislature did not leave to conjecture the purpose it had in mind when it made the enactment. The intent of the act is expressly stated in the fourth section. It is to legitimate an illegitimate child and its heirs as to its mother and her heirs. But it was not intended to change the existing law with regard to the father of such child or their respective heirs and legal representatives. The legal relation of an illegitimate child with the mother and her heirs, the purpose of the act as stated in the title, is to legitimate it as to the mother; as to the father, the legal relation remains unchanged. An illegitimate is placed on the same footing with a legitimate child of the mother, and both have the same capacity to take or inherit

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personal estate from or through each other as next of kin. An illegitimate child and its heirs, and the mother and her heirs, now enjoy all the rights and privileges in the same manner and to the same extent as if the child had been born in lawful wedlock. As between it and other illegitimate or legitimate children of the same mother, it is of the half blood; but as to the mother and her heirs, the act legitimates it. Not only is such child made heir of the mother and she of it, with capacity to take and inherit from each other, but with the capacity also to inherit through each other as next of kin and heirs under the intestate laws, subject, nevertheless, as regards real estate, to the distinction of half bloods. There is no distinction of blood as to personal estate: Act of April 8, 1833, P. L. 315. The distinction of blood is preserved as regards real estate. The law remains unchanged as to the capacity of an illegitimate to inherit real estate under the intestate law.

The act of July 10, 1901, enlarges the capacity of an illegitimate to take or inherit. It can now not only take or inherit from its mother but also through her. It is legitimated as to her and her heirs. Such child can take or inherit through her from maternal uncles and aunts and more remotely on the mother's side under the intestate law. The act changed the law as laid down in Rees's Estate, *supra*, and that case is no longer authority.

David Simmons is entitled to the share of his deceased mother, one of the children of Noah Umstead, a deceased brother of Reuben Umstead.

Court of Common Pleas of Montgomery County.

JOHN ROEHM VS. CHESTNUT HILL CASINO COMPANY, LIMITED.

A restriction in a judgment note given by a corporation that "said notes to be recorded only by due authorization," is imperfect in that it does not state by whom, how or under what circumstances authorization is to be given. An exception coextensive with a grant is a nullity.

RULE to strike off judgment. No. 92, March T., 1902.

Evans, Holland & Dettra, Esqs., for plaintiff.

N. H. Larzelere and *Samuel H. High, Esqs.*, for defendant.

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Opinion of the court by WEAND, J., February 27, 1905.

The depositions show that the defendant company was indebted to certain of its members in various amounts, and that on September 21, 1902, at a regular meeting of the stockholders of the company, a resolution was passed to the effect that the company should execute in favor of said creditor stockholders separate judgment notes for the amount of their claims, "said notes to be recorded only upon due authorization." John Roehm, a creditor, was present at the meeting and received a judgment note in his favor for $12,000, being the judgment note in question. The said note was marked to the use of the Corn Exchange National Bank on March 29, 1902, the same day on which judgment was entered in the Court of Common Pleas of Montgomery county.

The defendant in this proceeding asks that the judgment may be stricken from the record, because entered in violation of the condition under which it was given—that is, that no authorization was given for entering it of record. This is the only reason assigned in the petition. No question is therefore raised as to the *bona fides* of the indebtedness of the company to Roehm. The testimony establishes the fact that the bank credited the money paid on this judgment to the defendant company.

The simple question for our decision under the rule is, Did the words of the resolution, "to be recorded only upon due authorization," forbid this entry of judgment? If so, the giving of the judgment as a means of enforcing payment or securing a lien, would be meaningless. The very intent and purpose of a judgment note is to avoid suit, to determine the amount due, to have the means of collection and confession of judgment as an aid at maturity, and to obtain a lien before maturity. But how can any of these purposes be accomplished if the creditor can resort to his judgment only by consent of his debtor? Having judgment in the note, could he bring suit on it if the debtor did not authorize entry of judgment?

In our opinion the restriction is imperfect in that it does not state by whom, how, when or under what circumstances authorization is to be given. If the purpose was to prevent any preference amongst the creditors, what was to prevent authorization to one and not to the others? It simply stayed the hands of the creditor in the collection of his claim and placed him in a worse position than if he

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had not received his judgment. It is claimed, however, that the bank agreed to the condition.

In Fulton vs. Hood, 34 Pa., 365, it was said: "Nor is parol evidence admissible that at the time of the execution of a bond and warrant of attorney to confess judgment thereon it was agreed that judgment should not be entered up for a certain period, unless upon a specified contingency. This would be in direct conflict with the terms of the warrant of attorney." See also Lippincott vs. Rittenhouse, 9 Montg. Law R., 159. These and other authorities, therefore, render the testimony upon this point of no effect.

These cases relate to parol evidence to explain the circumstances; but the reasoning applies with equal force where the alleged restriction is in writing—that the restriction is in direct conflict with the terms of the warrant of attorney to confess judgment. The one nullifies the other.

The circumstances under which evidence can be given to change the terms of a written promise are defined in Anspach vs. Bast, 52 Pa., 356: "It is also decisive against a defendant that he relies on a parol agreement made contemporaneously with the note that it should not mature absolutely in six months, according to its terms. Were he permitted to go to trial, it would not be competent for him to give parol evidence of such an agreement. It contradicts the written contract of the parties. No doubt in a suit between the original parties to a promissory note parol evidence may be given to show what the consideration of the note was or that the consideration had failed. Such evidence does not contradict or vary the instrument. But no case goes to the length of ruling that such evidence is admissible to change the promise itself, without proof or even allegation of fraud or mistake." The court then cites authorities to support the principle.

There is no allegation or proof that Roehm accepted the note upon condition or that it would not have been executed without such condition. There is therefore nothing to support the claim that a fraudulent use is made of the note, which must exist in order to reform a written promise to pay.

If the contention of defendant is correct, then this judgment note is practically of no value to the holder. If he can not enter judgment by virtue of the confession, why should he be allowed to do so if he brought suit? It means, if anything, we owe you the

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amount and promise to pay it, but you can not collect it without our consent, thus changing the whole tenor and effect of the instrument.

This is not accommodation paper. The defendant parted with nothing that plaintiff could not have obtained by suit; and under this petition the whole amount must be assumed to be due. The intention in giving the note was to secure plaintiff's claim, and he is not using it for a purpose not intended. The condition is so inconsistent with the terms of the note and the conduct of business matters, and the method of authorization so ill defined, that we must hold the condition ineffective to prevent the entry of judgment.

The language of the Superior Court in First National Bank vs. Dick, 22 Super. Ct., 445, justifies our conclusion: "The alleged parol agreement that the bank would not look to the defendant for the note, but would collect it of the endorser, can avail nothing. Being omitted by design, it affords no basis for reformation; and, in effect, it was a total revocation of the note. When a written instrument is accompanied by a parol stipulation, purposely omitted, by which it is absolutely canceled, it is the parol agreement and not the written one that is void. Like an exception coextensive with the grant, such a stipulation is a nullity." The contest is between the debtor and creditor.

And now, February 27, 1905, the motion to strike off the judgment is overruled.

IN EQUITY.

HARRY FRY VS. HENRY LEOPOLD.

A decree for specific performance will not be granted if the transaction be inequitable and unjust in itself, and the inequity may be felt where it can not be so well pointed out. In such case the parties will be turned over to their remedy in damages, especially where the plaintiff has not shown that he will suffer in any other than a pecuniary way.

HEARING on bill, answer and testimony. No. 7, December T., 1904.

Henry M. Brownback, Esq., for plaintiff.

Evans & Dettra, Esqs., for defendant.

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Fry vs. Leopold.

Opinion of the court by WEAND, J., June 5, 1905.

HISTORY OF THE CASE.

The defendant, being the owner of a messuage, tenement, etc., situate in the village of Linfield, Montgomery county, by written articles of agreement, dated January 9, 1905, agreed to sell the same to plaintiff for the consideration of $1,700, the title to be passed on or before February 1, 1905. Twenty-five dollars of the purchase money were paid in cash. Subsequently defendant refused to comply with his contract, and the bill is brought to compel specific performance. The contention of defendant is that he was intoxicated at the time the contract was signed, and that the consideration is inadequate.

FINDINGS OF FACT.

1. That a contract was executed, as set forth in plaintiff's bill, on January 12, 1905, or as stated in the agreement dated January 9th; but the time is immaterial.

2. That at the time of signing the agreement the defendant was not under the influence of liquor to such an extent as that he did not realize what he was doing.

3. The plaintiff offered to comply with his part of the contract by a tender of the balance of the purchase money and deed; but the defendant refused, and this refusal was under advice of his friends.

4. Defendant is addicted to the use of liquor, frequently gets under its influence, and is easily persuaded. He had been offered $1,750 for the property a short time previously to this transaction, and had refused it. He is employed at a creamery, and sleeps in the building. On the morning of the day of this transaction, and on the morning following, the defendant showed evidences of having been intoxicated.

5. His reputation amongst his acquaintance is that of a heavy drinker. Each of his friends, when hearing of this sale, asked him the same question, "Were you drunk?" showing that to their minds the sale was disadvantageous to him.

6. The property is worth at least $2,000.

7. On the day subsequent to the signing of the contract, the defendant's employer offered to plaintiff the $25 down money, which offer plaintiff refused.

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8. Plaintiff has been put to no expense as shown, and has given no evidence that the property is desired as a home or for any particular purpose, or that he will suffer in any way by a rescission of the contract except in such damages as may be recovered in a suit at law.

9. That defendant was not in a condition to make this contract is shown by the fact that he had just refused $1,750 for the property, had no use for the money, and had the property rented.

10. On January 24th the defendant accompanied the plaintiff to the office of a justice of the peace to effect a settlement; but as the office was closed, another meeting was arranged.

CONCLUSION OF LAW.

That plaintiff's bill be dismissed with costs.

ARGUMENT.

"A decree for specific performance is not a matter of course, but rests in the sound discretion of the chancellor. Even when the agreement is perfectly good, the price adequate, and no blame attaches to the purchase, if the transaction be inequitable and unjust in itself, or rendered so by matter subsequently occurring, specific performance may be denied and the parties turned over to their remedy in damages": Friend vs. Lamb, 152 Pa., 529.

We can not declare the contract void; but taking into consideration the character, mental condition and habits of the defendant, we think it inequitable to enforce the contract by a decree for specific performance. If the plaintiff has suffered a loss, he can be compensated in damages; and he has not shown us that he will lose in any other than a pecuniary way. The defendant is unquestionably a man who needs the care and intervention of friends in business transactions. His refusal of an offer of $1,750 and an acceptance of $1,700 shows at once that he is easily persuaded or totally incompetent to transact business; and the testimony also shows that he is so regarded in the community, for to the minds of all who heard of the sale the first thought was that he must have been intoxicated. As Brackenridge, J., remarked in Campbell vs. Spencer, 2 Binn., 129: "When the heart revolts at the inequality of a contract, taking into view the parties, the occasion, and all considerations, there can

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not be said to be *equity*. The inequity may be felt where it can not be so well pointed out."

If the only evidence of defendant's habits was that shown on the date of signing the contract, there would be no sufficient evidence of intoxication to avoid the contract, taken in connection with his willingness to comply on January 24th; but we base our conclusions upon defendant's general character, which shows him to be a person easily persuaded into a contract of an improvident character, and which, for his protection, the court should not enforce by a decree for specific performance when plaintiff can be fully compensated in damages.

And now, June 5, 1905, a decree *nisi* is entered that upon the defendant's paying into court within ten days the sum of $25 for the use of plaintiff, money paid him by plaintiff, the bill will be dismissed with costs; otherwise a decree for a specific performance will be granted. And unless exceptions are filed to the findings and decree within the time limited by law, a final decree will be entered as per terms of decree *nisi*.

Norristown Trust Company vs. Alice C. Haenni.

Sheriff's sale—Misdescription—Division into lots.

Sheriff's sale bills after being properly posted were removed by storm. *Held*, not sufficient reason for a resale.

Sale had on a judgment on a bond accompanying a mortgage. The property had been divided by the owner into building lots, but used as a whole as a nursery. *Held*, not necessary for sheriff to sell by building lots.

Structures not particularly specified were necessary parts of the nursery plant or green house. *Held*, that they would be included in the description of "hot-houses"

The person who offered to give more at a resale had been a bidder at first sale, and bid within one dollar of the highest offer. No bond was offered. *Held*, no reason for resale.

Exceptions to sheriff's sale. No. 5, March T., 1905.

F. G. Hobson, Esq., for Norristown Trust Company.

J. B. Larzelere, Esq., for Alice C. Haenni.

Samuel H. High, Esq., for purchaser.

Opinion of the court by Weand, J., April 1, 1905.

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The property was sold on an execution issued on a judgment entered on a bond accompanying a mortgage, and sold to Daniel Sheehan for $10,601.

The defendant has filed exceptions to the confirmation of the sale, and assigns exceptions which may be divided into groups, as follows:

1. Paragraph 4. Failure on part of sheriff to post hand-bills upon certain lots.

2. Paragraph 5. Failure to advertise that a large portion of the property comprised a nursery plant, or to mention and describe the buildings and appurtenances.

3. Paragraph 6. Failure to state upon what lots the buildings and improvements were located.

4. Paragraph 7. Omitting from advertisements and bills certain buildings, structures, improvements, etc., consisting of a bulb-house, propagating house, cold-house, potting-house, hot beds, and fumigating-house.

5. Paragraph 8. Boiler-house described as "frame," whereas it is of stone; no mention of separate tank used in connection with a wind-mill or pump; failure to mention on what lots or streets dwelling-houses are erected; failure to mention on what street or lot a stable and green house are erected; failure to mention on which lots certain structures are erected, or that a store property is located on a certain lot and describing it in the hand-bills as a dwelling-house.

6. Paragraph 10. Certain lots were offered as a whole, though one is separated from the remainder; also inadequacy of price.

The sheriff's levy and advertisement follow the description contained in the mortgage, to wit: Four different lots of land with improvements, if any. In her mortgage the defendant did not divide the property into separate building lots, nor is there any testimony that she submitted to the sheriff any plan of lots. The property is used as a nursery, and the buildings necessary for the purpose are located on different parts or, as defendant calls them, lots.

The first and second exceptions are entirely without merit. It was not necessary for the sheriff to divide the property into lots and to place a hand-bill upon each one. The advertisement describes the property as "green-houses," which would imply that there were buildings and structures for that purpose.

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Third exception. As the property was not sold by town lots, it was not necessary to state upon which particular town lot a building was located; to have sold the lots separately would have destroyed the unity of the property as a nursery plant or green-house. As all the buildings mentioned in the exceptions as constituting the plant were used for one purpose, they could not be separated.

Fourth exception. The advertisement mentions boiler-house, hot-houses, storage building, frame shed, wind-pump, artesian wells, etc. According to defendant's contention, the omitted structures are necessary parts of a nursery plant or green-house; and it follows that an intended purchaser would assume that under the description of hot-houses these omitted parts were included.

Fifth exception. The error in describing the stable as frame, when it was stone, does not appear to have had any effect on the bidders. The description of No. 2 in the advertisement describes the property as located on Tulpehocken avenue 60.22 feet south-east of Cypress street, and mentions the dwelling-house, etc. No. 4 describes the property as situate on Cypress and Forest avenues, and describes the buildings with particularity.

Sixth exception. The different properties were offered separately and then as a whole, and sold as one for the higher price. There is no exception because of an omission to mention a stone quarry.

The person who now offers to bid more was present at the sale as a bidder, and bid within one dollar of the selling price; and having failed then to bid what he now considers the property worth, is entitled to but little consideration. In addition, no bond is offered that he will bid more.

In Landis & Crisman vs. Lewis, 3 Dist. Rep., 241, it was held that the description of a stone slaughter-house as a frame one was not such a material misdescription as would of itself warrant setting aside the sale, especially in the absence of evidence that it affected or was calculated to affect the sale disadvantageously.

Bills were properly posted by the sheriff, but the storm removed some of them. There is no evidence that any person neglected to attend the sale for want of notice.

The building alleged to be a store property at time of levy and sale, was used as a dwelling-house.

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The purchaser insists upon his rights to have the sale confirmed; and inadequacy of price alone will not justify us in setting aside the sale as against his protest.

Under the circumstances we see no good reason why another sale should be ordered.

And now, April 1, 1905, the exceptions are dismissed and the sale confirmed.

IN EQUITY.

JOHN E. HENSHALL VS. THE WILKINSON MANUFACTURING COMPANY, ALFRED WILKINSON, TREASURER, AND CHARLES R. LEMBACH, SECRETARY AND TREASURER.

Where the purchaser of shares of stock does not show that the stock has any special or peculiar value to himself, or that the damages for the failure to assign can not be ascertained, equity will not compel a transfer, because the claimant has an adequate remedy at law.

DEMURRER to plaintiff's bill. No. 4, October T., 1900.

J. F. Miller, Esq., for plaintiff.

Hillegass & Larzelere, Esqs., for defendants.

Opinion of the court by SWARTZ, P. J., February 18, 1901.

The bill was filed to compel the defendants to transfer and assign to the plaintiff any shares of stock Alfred Wilkinson may have owned in defendant company at the time of the levy by the sheriff, April 24, 1900. True, there is a demand to disclose the number of shares of stock so held in the company by Alfred Wilkinson; but this is only an incident to the request for a transfer. The purpose of the bill is to secure a transfer of the stock.

Equity will not compel the transfer of stock, because the claimant has an adequate remedy at law in an action on the case for damages: Edelman vs. Latshaw, 159 Pa., 644; Birmingham Fire Insurance Co. vs. Commonwealth, 92 Pa., 72. The bill does not allege that the plaintiff purchased the stock for any special purpose, or that the stocks have any special or peculiar value to him. It is not shown by the bill that the damages for the failure to assign can not be ascertained, or that the stocks do not have a market value.

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The bill also discloses the fact that no stocks were levied upon by the sheriff or sold to the plaintiff. The sheriff levied on the *interest* of Alfred Wilkinson in the manufacturing company, and the certificate marked "Exhibit A" shows that this is all the plaintiff purchased. The bill refers to the proceedings in this court under the *testatum fi. fa.*, and the record discloses that the sheriff's certificate follows his levy. It is not necessary to decide whether anything passed under this sale; for even if plaintiff purchased shares of stock, his bill must be dismissed under the fifteenth demurrer, which raises the question of jurisdiction.

And now, February 18, 1901, judgment for defendants on the demurrer, and bill dismissed at the cost of the plaintiff.

IN EQUITY.

WILLIAM W. POTTS AND ELLA H. POTTS, HIS WIFE, IN RIGHT OF THE SAID ELLA H. POTTS, VS. PHILADELPHIA AND READING RAILWAY COMPANY AND RICHARD HECKSCHER & SONS COMPANY, CORPORATIONS.

A railroad company has the right to build a siding to a manufacturing establishment and to condemn land, if necessary, to reach such plant. A side-track which leads only to a manufacturing establishment held in private ownership subserves a public use.

The act of March 17, 1869, P. L. 12, gives the right to extend and improve a siding. Sidings are improved by increasing their number, or they may be improved by extending them or changing their grade.

If the company did not have the right to condemn the land for an additional siding under the act of 1869, it had such right as an incident to the right to build a railroad. Assigning a wrong authority for its action, cannot defeat the right to do the act where such right, in fact, existed.

FINDINGS and conclusions upon final hearing. No. 2, March T., 1905.

Larzelere, Gibson & Fox, Esqs., for plaintiffs.

Theo. Lane Bean and *C. Henry Stinson, Esqs.*, for Heckscher.

Montgomery Evans, Esq., for railway company.

Opinion of the court by SWARTZ, P. J., May 13, 1905.

The bill was filed on April 11, 1905, and prayed for a preliminary injunction. At the hearing on April 24, 1905, all parties in

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interest agreed that the court should treat the hearing as a final one on bill, answers, and the evidence submitted.

The allegation in the bill is that the defendant railway company is attempting to condemn the plaintiff's land for the private uses of the furnace company of Heckscher & Sons. This is denied by the answers. Both defendant companies allege that the land condemned is to be used for general railroad purposes in shifting cars for the customers of the railway.

We find the following facts from the evidence submitted. The stenographic notes, as transcribed, show that the testimony was not taken down fully and clearly. The material facts, however, can be gathered from the notes.

FACTS FOUND BY THE COURT UPON FINAL HEARING.

1. The main line of the Philadelphia and Reading railway passed along the southwest side of the Heckscher furnaces. The proximity of the furnace operations endangered to some extent the railroad traffic. The defendant railway decided to change the location of its roadway by removing the main line to the northeast side of the furnaces. The furnace company exchanged deeds with the railway. The latter company acquired a strip of ground from the furnace company and constructed its main line on the northeast side of the furnaces. The railway company in consideration of this deed granted certain lands on the southwest of the furnaces to the furnace company. The land thus acquired by the furnace company embraced the old road-bed so far as the railway company owned a fee therein.

2. The deed to the Heckscher company bears date August 29, 1904. The deed was not recorded until January 9, 1905. The deed was not delivered on the day it bears date. The delay was due, in part at least, to the fact that the railway company, before it could give a good title, had to secure releases from certain general mortgages.

3. On October 19, 1904, the president and directors of the railway company passed a resolution that "the company deemed it necessary for the better securing the safety of passengers and property and increasing the facilities and capacity for the transportation of traffic, to widen, enlarge and improve the line of its railway at a point near Swedeland station, in Upper Merion township,

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Montgomery county, Pennsylvania, by the construction of additional tracks, and for such purpose to purchase, hold and use or enter upon, take and appropriate a strip of ground belonging to Ella H. Potts, containing ninety-six one-hundredths of an acre." The property is fully described in the first paragraph of the plaintiffs' bill. It is a strip of ground bounded on the west by a public road, on the east by the old railway road bed, and on the north and south by the Heckscher furnace property. It fronts on the public road a distance of about six hundred and sixty feet, and extends back to the centre line of the old railway road-bed.

4. On November 2, 1904, the defendant railway company filed its bond in $4,000 in proceedings to condemn this entire strip of ground. No objection was made to the bond or the proceedings, and on November 7, 1904, the court approved the bond. At that time the deed to the Heckscher company for the old road-bed was not recorded, and the plaintiffs had no knowledge of the exchange of deeds between the furnace company and the railroad company. Whether the deeds were delivered as early as this date does not appear; but the plaintiffs had no knowledge of the contract of sale between the defendant parties.

5. The plaintiffs filed their bill soon after this knowledge was acquired, and ask the court to revoke the approval of the bond on the ground that they were deceived as to the real status of the railroad company as to the ownership of the old railroad bed; and on the further ground that the railroad company has no legal right to take the strip of ground in question.

6. The westernmost track on the old road-bed, being the south-bound track, was not embraced in the deed from the railroad company to the furnace company. The fee to this part of the road-bed was in Mrs. Potts, the plaintiff. Her title covered this part of the old road-bed. Apparently the railroad company had no more than a right of way over this portion of its road bed.

7. By an abandonment of this portion of the road-bed the land would revert to Mrs. Potts discharged from any easement of the railroad company. There is no evidence before us from which we can find any abandonment. The deed to the Hecksher company does not show it, and the proceedings to condemn show that the railroad company still lays claim to the right of this south-bound track. The company proposes to take the plaintiffs' ground "to widen, enlarge

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and improve the line of its railway." The act of widening or improving implies that the company has an existing right of way at this point. It could not widen or improve something it did not have.

8. The railroad company is still using this south-bound track for the purpose of transferring and shifting cars from the Heckscher furnaces and for other shippers who are patrons of its railroad. We find as a fact that the increased demands of the furnace company and the needs of the other industries in the immediate locality require additional sidings and improvements to accommodate the traffic of the railroad company, and that such sidings and improvements can not be constructed without the use of the ground now owned by the plaintiffs and which the railroad company has condemned.

9. The south bound track so far as it adjoins plaintiffs' land is part of a continuous siding from the main line of the railroad to the Heckscher furnaces, and when the improvements are completed it will pass over the Heckscher property until it again meets the line of the main road.

10. The Heckscher company admits that it has no title to the south-bound track from the southern boundary line of the plaintiffs' property to the point in the north where the new road-bed begins to diverge from the old line of the railroad.

11. The effort on the part of the Heckscher brothers to purchase the strip of ground in question was made at the instance of the secretary of the defendant railroad company, and the purpose was to purchase for the railroad company and not for the furnace company. It was believed that the Heckschers could secure the property for the railroad company at a lower figure than the railroad company itself could acquire it by dealing directly with Mr. Potts.

12. There will be from one hundred to one hundred and twenty-five cars to be handled at the furnaces daily, and to accommodate this traffic sidings and turnouts are a necessity. This does not include the cars of other patrons of the road whose cars will use this siding.

CONCLUSIONS OF LAW.

1. The proceedings to take the plaintiffs' property were based upon the act of March 17, 1869, P. L. 12, and this act provides for the widening of a railroad bed or for the improvement of the cross-

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ings and sidings thereof. Under our findings of facts the defendant railroad is doing exactly what this act authorizes it to do.

2. The elevation of the existing track and the addition of another siding or turnout are acts calculated to increase the facilities and capacity for the transportation of traffic. The company is the best judge as to the need of these facilities.

3. A side track which leads to a large industrial plant, such as the Heckscher furnaces, with its surrounding shoddy mill, stone quarry and other plants, subserves a public use. It is the right of the railroad company, as well as its duty, to make provision to accommodate this traffic.

4. The bill of the plaintiffs must be dismissed at their costs.

ARGUMENT IN SUPPORT OF OUR FINDINGS AND CONCLUSIONS.

There is no evidence which shows any abandonment of the south-bound track by the defendant railroad. This track has been in constant use to supply the needs of the furnaces since the change was made in the location of the main line of the railroad. The temporary nonuser is due to the fact that the track is being elevated to afford better accommodations for the traffic of the furnaces.

If the change by shifting the main line road-bed to the northeast is an abandonment of every right the railroad company had on the southwest side of the furnaces, still the company had the right to construct a siding from its main line to the furnaces over the route now occupied by the old south-bound track. If it had the right to construct such new siding, it follows that it must have the right to maintain the old track just where it now exists, and to improve it so as to meet the needs of the traffic in the locality. That there is a right to build a siding to a manufacturing establishment and to condemn land if necessary to reach such plant was decided in Getz's Appeal, 10 W. N. C., 453. A power to build side-tracks is essential to the purpose and use of a railroad. "A side-track which leads only to a manufacturing or mining establishment, held in private ownership, subserves a *public* use." "These establishments are very numerous, especially in Pennsylvania, along a near line of railroad. They serve to develop the resources of the state, they give employment to vast numbers of citizens, and constitute a most important element in the general wealth and prosperity of the community. Convenience and consequent cheapness of transpor-

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tation are in most cases essential, and, in many, vital to their maintenance. Moreover, considerable portions of the general public are directly interested in the traffic which goes to them and that which comes from them. Hence in the connection in which we are now considering them we can not regard them as merely private interests, and therefore without the pale of that public use for which private property may be taken in the construction of railroads lawfully established and actually used for public purposes": Getz's Appeal, *supra*. It must follow that a right to build such siding includes the right to improve and enlarge it when the old no longer meets the needs of traffic.

While the company may not maintain two main lines through Swedeland, it does not follow that when it shifts its main line it must also sever its connection with a manufacturing plant that it has continued to accommodate for many years.

The act of March 17, 1869, P. L. 12, gives the right to extend and improve a siding. Sidings are widened by increasing their number, or they may be improved by extending them or changing their grade: Glaser vs. Glenwood R. R. Co., 33 Pitts. Leg. Journal, 299; affirmed in 208 Pa., 330.

We think the action of the railroad company falls within the right granted under the act of March 17, 1869, P. L. 12; but if we are in error, and the company by its resolution gave a wrong basis for its action, we do not see how this can help plaintiffs' case. The company has the right to do the work which it is doing as we have endeavored to show. Assigning a wrong authority for its action can not defeat the right to do the act. If the act of 1869 does not apply, then the right to build this siding with its additions is a necessary incident to the right to build a railroad: Black vs. Philadelphia and Reading Railroad, 58 Pa., 252; Getz's Appeal, 10 W. N. C., 453.

And now, May 13, 1905, it is ordered, adjudged and decreed that the prothonotary enter a decree *nisi*, dismissing the bill at the costs of the plaintiffs; and if no exceptions are filed as provided by the equity rules, he will enter a final decree accordingly, as of course.

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POTTSTOWN PASSENGER RAILWAY ET AL. VS. TRAPPE AND LIMERICK ELECTRIC STREET RAILWAY ET AL.

Grade crossings of electric passenger railways—Regulation as to such crossings to be determined under the Act of 1871, P. L. 136.

If a new passenger railway proposes to cross at grade an existing street railway, and cannot agree upon the terms and conditions to be observed in the construction and use of the crossing, either party can apply to the court under the Act of June 19, 1871, P. L. 1360, to ascertain and define the mode of crossing which will inflict the least practical injury upon the rights of the company owning the road intended to be crossed. This act applies to street railway crossings.

Whether the defendant company has the right to cross at grade the existing railway at a point other than at a street crossing not decided.

Where a defendant with a strong hand constructed the grade crossing while proceedings were pending to fix the terms of the crossing, a preliminary injunction will be awarded restraining it from any use of such crossing until the further order of the court.

APPLICATION for a preliminary injunction. No. 1, March T., 1905.

Montgomery Evans, Esq., for plaintiff.

N. H. Larzelere, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., May 4, 1905.

The Pottstown Passenger Railway Company operated a street railway for some years along and upon the Perkiomen and Reading turnpike road. The occupation of this highway was secured to the plaintiff company by articles of agreement with the turnpike company. Since the execution of such agreement, the turnpike company was declared free from tolls, under the act of June 2, 1887, P. L. 306, and its supplements.

In December, 1904, the Pottstown Passenger Railway Company leased its road to the Pottstown and Reading Street Railway Company, and the latter company thereafter operated the passenger railway.

The Trappe and Limerick Electric Street Railway Company was incorporated in 1899, or nine years after the plaintiff company obtained its letters patent.

The Schuylkill Valley Traction Company is the lessee of the Trappe and Limerick railway. The latter company filed in the proper offices certain extensions or branches, and in pursuance thereof is constructing a railway across the plaintiff company's road. This extension or branch is being constructed in part over and along public highways and in part over private rights of way

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secured from land owners. The extension crosses the turnpike road upon which the plaintiff's roadway is located. The defendant company proposes to cross the plaintiff's road at grade and at a point where no public road intersects the turnpike—that is, on each side of the turnpike the defendant has what it terms in its answer a private right of way. The proposed crossing is nearly at right angles.

The defendant company began the construction of this extension in the fall of 1904. In November, 1904, it placed an order for the construction of a steel rail crossing. The crossing was delivered upon the ground in the beginning of March, 1905, and placed upon the side of the highway. The grading of the extension route on each side of the turnpike was progressing rapidly. No application was made to the plaintiff company for a consent to cross, or for any agreement as to the manner of crossing, or for any terms as to the use of the crossing in the operation of the cars over the same.

On April 8, 1905, the plaintiff company and its lessee filed a bill for an injunction. The complaint alleges, first, that the defendant company has no right to cross the existing railway except at a public road intersection; and secondly, that there is no right to a grade crossing until the proper regulations and restrictions are imposed as to the manner of making the crossing, and until the rights and duties of the respective parties as to the methods of operation are defined and fixed.

We granted a rule for a hearing, returnable April 17, 1905. Before the day of hearing, the parties asked for a continuance. We then fixed April 28, 1905, at 10 a. m., for a hearing, if the parties did not in the meantime reach terms of settlement.

On the afternoon of the 17th of April, the defendant company sent its representative to Pottstown to arrange a meeting with the plaintiff company to consider the crossing problem. The managing superintendent of the plaintiff company was away on business, and the representative of the defendant company was informed that a message would be sent on the following day informing him whether the meeting could be held on Thursday, the 20th of April. The message was sent by phone that the managing superintendent had gone to Georgia and would not return before Tuesday the 25th of April.

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On Friday night, the 21st of April, about midnight, the defendant company, with a force of thirty-five men, put down the crossing and finished the work on Saturday morning about three o'clock. The excuse for this action is given that the plaintiff company did not intend to enter into an amicable agreement but obtained the continuance of the hearing to delay and harass the defendant company in the construction of its extension.

The evidence of deceit is very slight indeed. The managing superintendent for plaintiff did not even know that there was a continuance obtained on the 17th of April. He was not present on the 17th, did not expect to attend the hearing, and did not know that he was required at the second hearing until he returned from his business trip and was notified to that effect. True, when on the stand he testified that one of the first questions to be determined was whether the defendant had any legal right to cross the plaintiff's road. This, however, was not a new proposition, for the bill that was filed raised this very question. The defendant must have known for months that the question of the grade crossing must be met sooner or later. When no overtures of any character were submitted it is not surprising that the plaintiff company resorted to the courts for protection. The conditions presented a fair subject for contention, and when no amicable efforts were made by the invading road to settle the difficulty, the plaintiff resorted to the law, which ought to provide adequate and orderly ways to settle such differences.

The hearing was fixed for the 28th of April. Only six days before this time the defendant attempted to fix the rights of the respective parties by the use of the strong hand. Whether the defendant has the right to cross the plaintiff's road at the point designated, we shall not now decide. That is a question we can best determine at a final hearing, which can be speedily had, because an answer is already filed. If the defendant has the right to cross, it has no right to fix its own terms of crossing at grade. For the protection of the passengers who may use the plaintiff and defendant roads, proper regulations and restrictions must be imposed. The rights and duties of the respective roads must be defined. If the parties can not agree upon these terms and rights, the court, with the aid of counsel and evidence, must fix them. Clearly the crossing road is not the party to determine the method

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of construction or the regulations in the operation of the roads without consultation with the existing road. If the construction necessarily gives advantages to one of the roads, these advantages belong to the old road. For example, if there is any advantage in a continuous rail, such advantage belongs to the existing road, and the broken or cut rail should not be imposed upon it, as was done in this case.

The second section of the act of June 19, 1871, P. L. 1360, declares, "when such legal proceedings relate to crossings of lines of railroads by other railroads, it shall be the duty of the courts of equity of this commonwealth to ascertain and define by their decree the mode of such crossing which will inflict the least practical injury upon the rights of the company owning the road intended to be crossed." This section of the act applies to passenger railways: "The words railroad and railway are synonymous, and in all ordinary circumstances they are to be treated as without distinction of meaning, . . . electric railway companies are railroad companies within the purview of the act of June 19, 1871, regulating the crossings of railroads at grade." Old Colony Trust Co. vs. Transit Co., 192 Pa., 604. Penna. Railroad Co. vs. Electric Railway Co., 152 Pa., 116. The danger at a grade crossing of two electric railways is not so serious as at a steam road crossing; still, the numerous accidents at street railway crossings admonish us that it is necessary to establish safety regulations before such grade crossings are used in the operation and movement of cars.

We shall not direct the removal of the crossing put down by the defendant company. The evidence on both sides shows that it is a good crossing and of standard construction. If we enjoin the use of it by the defendant companies until terms are established and until the right to cross at grade is determined, the plaintiff company will not suffer any material interference by the construction.

And now, May 4, 1905, a preliminary injunction is awarded, restraining the defendant companies, their officers, contractors and employes, from obstructing said crossing, or from operating any car or cars over the crossing until the further order of the court, plaintiffs to give bond with surety in the sum of five hundred dollars.

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POTTSTOWN PASSENGER RAILWAY ET AL. VS. TRAPPE AND LIMERICK ELECTRIC STREET RAILWAY ET AL.

Street railway grade crossings—One company acting with force condemned—Route over private right of way—Crossing at grade at a point other than at a highway crossing.

One street railway company may not cross another at grade before the terms, conditions and safety precautions are agreed upon.

Where the parties can not agree, the terms must be fixed by the court under proceedings governed by the second section of the act of June 19, 1871, P. L. 1360. This act applies to street railway crossings as well as to steam road crossings.

If one party attempts to cross at grade with a strong hand, it is the duty of the court to interfere by injunction; and if any advantage is taken of the older existing railway, the court will order a restoration of conditions as they existed prior to the force used in constructing the crossing.

A street railway chartered under the act of May 14, 1889, P. L. 211, is entitled to the benefits conferred by the amending act of June 7, 1901, P. L. 514. To make connection with any portion of its tracts it may acquire property by purchase; and if the property so acquired intersects a public highway, a grade crossing over another railway may be established at such point, although there is no highway crossing another highway at said point.

FINDINGS of facts and conclusions of law upon final hearing before the court. No. 1, March T., 1905.

Montgomery Evans, Esq., for plaintiff.

N. H. Larzelere, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., June 5, 1905.

The Trappe and Limerick Electric Street Railway is constructing an extension, and the route of this extension crosses the plaintiff railway at grade. The plaintiff companies ask for an injunction to restrain such crossing. The extension is located for two-thirds of its route over private rights of way. The proposed crossing is at a point where the defendant's private right of way passes over a public highway. On this public highway the plaintiff company is operating its street railway. There is no street or road crossing the plaintiff's roadbed at the point where the defendant company proposes to establish a grade crossing. The plaintiff company contends that its roadway may not be crossed except at a public road crossing. The plaintiff company also contends that if such crossing is lawful, that it can not be used until the rights and duties of the respective parties in operating their cars over the crossing are determined, either by agreement of the parties or the intervention of the court.

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Passenger Railway et al. vs. Electric Street Railway et al.

FINDINGS OF FACTS.

1. The Pottstown Passenger Railway Company was incorporated under the act of May 14, 1889, P. L. 211. Letters patent were issued to it on July 3, 1890. It constructed and operated a passenger railway through the borough of Pottstown. Its road extended eastward beyond the borough limits, and was constructed on the roadbed of the Perkiomen and Reading turnpike. The railway company occupied the turnpike under a contract with the latter company. After the construction of the railway the turnpike was declared free from tolls by proceedings duly had under the act of June 2, 1887, P. L. 306.

2. The Pottstown Passenger Railway leased its road to the Pottstown and Reading Street Railway Company for the term of nine hundred and ninety-nine years. This lease went into effect on December 1, 1904.

3. The Trappe and Limerick Electric Street Railway Company was incorporated under the said act of 1889, and letters patent were issued to it on July 25, 1899. It constructed and operated a street railway on the Perkiomen and Reading turnpike road, but its occupancy of this highway was to the east of the terminus of the plaintiff company. The turnpike runs nearly east and west.

4. The Trappe and Limerick Company authorized an extension of its road on July 7, 1904. The route of this extension is designated mainly by courses and distances. The proceedings were duly recorded in the office of the Recorder, at Norristown, in Miscellaneous Book No. 57, page 246, etc., and an exemplification of the record was filed in the office of the Secretary of the Commonwealth. This extension begins on the charter route of the company at a point in the Perkiomen and Reading turnpike road, in Limerick township, and ends at York and High streets in the borough of Pottstown. It leaves the highway at its beginning and passes over private rights of way. The route passes to the north of the turnpike, following its private right of way for a distance of about two and three-fourths miles, when it again reaches the turnpike and crosses the same, along its private right of way, over lands of Montgomery Missimer, to the south side of the turnpike. In crossing the turnpike at this point it passes over the plaintiff's tracks at grade. This is the crossing in controversy. The route

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still continues over private rights of way for more than one-half mile, and then enters upon Queen street, in the borough of Pottstown, and follows along said Queen street; thence along Adams, King and York streets to High street. The length of the extension is five and three-fourths miles, and all of the route, other than two and one-fourth miles, passes over private rights of way. In following its route over these private rights of way it crosses six public roads at points where there are no highway crossings.

5. If the defendant company follows the route designated in the extension proceedings, it must cross the plaintiff road at the point in controversy. It can not cross the turnpike at a public road crossing without departing from the route designated in its extension.

6. To enter Pottstown and reach the terminus of its extension by following public highways, would require a detour or divergence of several miles, according to the evidence.

7. The crossing is a diagonal one, and is located on the south side of the turnpike road, the plaintiff's roadbed being located on said side of the public highway. Moving westward, the extension approaches the crossing at a steep ascending grade. There is also a curve in the roadbed of the extension just before it reaches the turnpike; that is, as the extension approaches the crossing from the east. The cars of the defendant company moving westward will be impeded just before they reach the crossing by reason of the grade and curve aforesaid. This approach going westward passes through a cut. This cut, a short distance from the crossing, has a depth nearly equal to the height of a street car. Cars on the plaintiff road, whether moving eastward or westward, have a poor view of a car on the defendant road approaching from the east. This is due to the cut, some trees, a barn east of the crossing, and the curve in the defendant's road. The defendant road follows a valley, and the view of this low ground is obstructed, in part, by the elevated ground immediately north or east of the turnpike. The view is good on either road as a car on the defendant road approaches the crossing from the west. The grade from this direction is also an ascending one.

8. The danger from an obstructed view is materially lessened from the fact that the defendant must approach the crossing from the east at a reduced speed; the grade and curve will prevent fast

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running. The car must also cross the turnpike before it reaches the grade crossing. A motorman on the plaintiff car, when seventy-five feet from the crossing, can see a defendant car one hundred and eight feet east of the crossing. Fifty feet from the crossing the defendant car can be seen nearly two hundred feet east of the crossing.

9. If the plaintiff car slows up as it nears the crossing, and the defendant car stops not nearer than fifty feet from the crossing and sends the conductor ahead to signal his motorman, the necessary precautions for safety are established. As the plaintiff road has the right of way, and the defendant company approaches the crossing from either direction at an ascending grade, we do not consider this crossing dangerous beyond the ordinary danger at any crossing at grade.

10. The plaintiff road is straight for a considerable distance west of the crossing. Its roadbed is on the side of the highway. At present it can make fast time on this stretch of roadway. The establishment of a grade crossing at the point in controversy will necessarily compel the company to reduce its speed at and near the crossing. The crossing is therefore a special disadvantage to the plaintiff road.

11. As stated in our preliminary decree, the defendant company began the construction of its extension in the fall of 1904. In November, 1904, it placed an order for the construction of a steel rail crossing. This crossing was delivered on the ground in the beginning of March, 1905, and placed upon the side of the highway. The grading of the extension road, on either side of the turnpike, was progressing rapidly. No application was made to the plaintiff company for consent to cross, or for any agreement as to the manner of crossing, or for any terms as to the use of the crossing in the operation of the defendant's cars over the same. On April 8, 1905, the plaintiff company filed a bill for an injunction to restrain the crossing of its road by the defendant company. A rule for a hearing was granted by the court, but before the hearing for a preliminary injunction was had, the defendant company put the steel rail crossing in place and protected it by placing a car upon it during each night when the plaintiff company was not using its road. The excuse for this action was given that the plaintiff company delayed the hearing to embarrass the defendant company

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in completing its branch or extension. We found that this excuse was without merit, and the further evidence taken has not changed our views.

12. There is no allegation in the bill that the defendant can cross the plaintiff road without establishing a grade crossing. The contention is, that there is no legal right in the defendant company to cross the plaintiff road, and that if such right exists, then the court shall fix the terms and precautions for a grade crossing. All the testimony was directed to these points.

CONCLUSIONS OF LAW.

1. The extension was made subsequent to the act of June 7, 1901, P. L. 514, and under the seventh section of said act the defendant company has the right to acquire property by purchase and to lay its tracks upon the same as if it were a public highway, where it deems it necessary to do so, in order to make connections with any portion of its tracks, whether main line, branches or extensions.

2. Under this section of the act of 1901, the defendant company has the right to cross the roadbed of the plaintiff company at a point other than at a public road crossing. The land acquired by purchase may be occupied for its tracks, "as if it were a public highway."

3. The abandonment of the extension route from York street to High street, with the consent of the local authorities, was valid, without recording the proceedings in the Recorder's office, at Norristown. The company complied with the requisites of the law.

4. Whether the plaintiff has acquired a longer right of private way than the law permits, or whether the divergence from the public highways is excessive, are matters for objection from the commonwealth. The plaintiff company's rights are not different in kind from those of the general public, so far as the extension route is concerned, except at the crossing itself.

5. Before the defendant company can operate its cars over the crossing, an agreement must be entered into between the parties plaintiff and defendant. This agreement should embrace the regulations and precautions to be observed by the respective parties in the use of the crossing; the construction and repair of the crossing; the insulation of the respective tracks; and any other matters

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that properly enter into the consideration of the parties where a crossing of this character is established. The safety of the public in the use of the highway or in the use of the cars must be carefully guarded and provided for in the agreement. The special knowledge and experience of the parties interested in the railways will enable them to frame this agreement. If the parties can not unite upon a stipulation to be submitted to the court, we shall endeavor to prepare a decree to meet the requirements of the case. The parties will submit a form of decree, in accordance with the views herein expressed, within fifteen days from the notice of the filing of this opinion.

6. The costs of the equity proceedings are placed upon the defendants.

ARGUMENT.

A careful view of the crossing and its surroundings satisfies us that the crossing is not a dangerous one beyond the usual danger that attends any grade crossing. South of the turnpike road the country is open and lower than the bed of the highway. The motorman on either railway has a good view as a car on the defendant road approaches the crossing from the west. Each can see the car on the other road in ample time to avoid a collision. To the north of the turnpike the view is not good, still the motorman on one road can see the approaching car on the other road when both cars are about one hundred feet from the crossing. The plaintiff company being the older road must have the right of way. This is an advantage, for the defendant company will have much better control of its cars as they approach the crossing than the plaintiff company has over its cars as they approach the crossing. If the defendant car loses its power and the break refuses to work, the car will drift down the steep grade instead of moving forward to the crossing.

The steel rail crossing, as constructed and put in place, is a good one. It is of standard construction. The continuous rail was given to the defendant company because the roadbed of the defendant company has in actual use the heavier rail. The broken rail should not be imposed on the plaintiff company, and if there were any material advantage in the continuous or unbroken rail it should be given to the older company. The weight of the evi-

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dence shows that there is no material difference or advantage in the one construction over the other.

The bill was properly filed by the plaintiffs. There was every indication that the defendant company intended to establish a grade crossing without giving any voice to the plaintiff company as to the "mode of crossing." The actual placing of the crossing afterwards without notice or consultation is proof of this intent. The plaintiff had the right to apply to the court to enforce the act of June 19, 1871, P. L. 1360. The second section of this act applies to grade crossings by two passenger railway companies: Old Colony Trust Co. vs. The Transit Co., 192 Pa., 604; Penna. R. R. Co. vs. Electric Railway Co., 152 Pa., 116. The costs must therefore be placed upon the defendants.

Has the defendant company the right to cross the plaintiff road at a point other than at a highway crossing?

Under the act of May 14, 1889, P. L. 211, it was held that a street railway may not cross a steam road except at a public road crossing. The court said the authority given in the eighteenth section of the act of 1889 "refers only to crossing at a point where the street or highway on which the street railway is located crosses the steam railroad": Railway Co. vs. Electric Co., 177 Pa., 152.

We think the reason given for this ruling would also prevent one street railway from crossing another except at a highway crossing. In the case cited the conclusion is based upon the provisions of the act of 1889. These provisions, the court say, establish the fact that the location, construction and operation of street railways are authorized only on public streets and highways: Railway Company vs. The Electric Company, *supra.*

It is argued that a street railway company may diverge from a public highway for a short distance: Rahn Township vs. Street Railway, 167 Pa., 90; and that therefore it follows that it may cross a highway at any point where such divergence crosses the highway. Under the act of 1889 the divergence must be for a short distance, and only where the conformity of the surface, the position of a stream or some similar difficulty, makes it necessary to diverge in order to avoid discomfort or danger to the traveling public. The evidence presents no case of this character at the crossing now under consideration.

Unless the defendant company is entitled to the benefit of the

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seventh section of the act of June 7, 1901, P. L. 514, we do not see how this crossing can be justified. This section reads: "Any railway company, incorporated under this act, shall have the right and power, if it deem it to be necessary, in order to make connections with any portion of its track, whether main line, branches or extensions, to acquire property, either by purchase or otherwise, and after acquiring such property, shall have the right to lay its track upon the same as if it were a public highway, and to connect the track, so laid upon the property so acquired, with any other portion of its track laid upon public highways adjacent thereto." It is argued by counsel for plaintiffs that the defendant is not entitled to the benefits of this section of the act of 1901, because it was not "incorporated under this act," but under the act of 1889.

The act of 1901 is an amendment of the act of 1889; it is so styled in its title. The fourth section of the act of 1889 is amended by the act of 1901, and this is the section under which extensions are authorized. When the extension of the defendant company was duly certified to the Secretary of the Commonwealth, in 1904, it became an extension under the act of 1889, as amended under the act of 1901. Street railways are incorporated under the act of 1889. Every section of the act of 1901 recognizes the act of 1889 as the incorporating act. Nearly every section of the act of 1901 uses the words "incorporated under this act," and the expression clearly refers to the act of 1889. Why should we give a different interpretation to the same words in the seventh section of the act of 1901? The eighth section also shows that there is but one incorporating act. It declares "no street passenger railway heretofore or hereafter incorporated under the act hereby amended shall . . ." That is, the act of 1901 is not an incorporating act but an amendment of the act of 1889, under which all incorporations must hereafter be made, just as they were made heretofore, except that both old and new companies shall have the benefit of the amendments found in the act of 1901. Any other interpretation would work out an unjust discrimination. A company incorporated after 1901, which made an extension in 1904, would enjoy privileges which a company incorporated prior to 1901 would be denied, although its extension may have been authorized in 1905. There is nothing in the act of 1901 which requires any action or stipula-

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tion by companies incorporated prior to 1901 before they can secure the benefits of the act of 1901.

An amendment takes effect from its date, but as to matters arising subsequent to its passage, the amendment must be read into the statute as if its provisions had always been there.

It is also argued that the seventh section of the act of 1901 has no application to the defendant's crossing, because the private land, where the crossing occurs, was not acquired "to make connections with any portions of the defendant's tracks," but to parallel a highway to reach a distant town.

Under the act of 1889, a passenger railway company could not diverge from the public highways except for a short distance, to avoid discomfort or danger to the traveling public, or for some other reason amounting to necessity: Penna. R. R. Co. vs. Street Railway Co., 176 Pa., 559. The seventh section of the act of 1901, amending the act of 1889, evidently intended to extend or enlarge the power to lay tracks upon private ground. The connection which the company may make must refer to a connection with one section of its route and another section of the same route, the termini of the sections to be connected being upon public highways. It can not refer to a connection between two independent railways, at least not exclusively to such a condition. A passenger railway under the act of 1889, must have a complete circuit. A company incorporated under the act must have a continuous route. When the seventh section of the act of 1901 speaks of "connections with any portion of of *its track*," it must mean *its track* under the charter route or extension designated. The section contemplates that the necessity for a private right of way may arise in the construction of the route between the two termini designated in the charter, or in the extension. It may connect one portion of its track with another portion of its track by a private right of way, because the act so declares, where the company deems it necessary.

If the defendant company has the right to connect one portion of its track with another portion of its track over a private right of way, it follows that it may cross a highway at a point not intersected by a public road, where such private way crosses the highway. The private right of way becomes a public highway for the purposes of laying the tracks of the railway. The act declares,

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"and after acquiring such property shall have the right to lay its tracks upon the same as if it were a public highway."

The plaintiff company may contest the rights of the defendant at the crossing in question, because the plaintiff's interests at this point differ in kind from those of the general public. But as to the defendant's route at other points including the right to secure a way through private property, the rights of the plaintiff do not differ from those of the general public. If the departure from the highways is greater than necessary, the commonwealth alone can be heard to object, in the interests of the general public: Penna. R. R. Co. vs. Street Railway Co., 176 Pa., 577.

The seventh section of the act of 1901 makes the company the judge of the necessity in the first instance, whether land must be acquired for a private right of way. Primarily the discretion is vested in the railway company. If the route is open to objection, the commonwealth should make it in the interests of the general public: Penna. R. R. Co. vs. Street Railway, *supra*.

It may well be that counsel for plaintiff is correct in alleging that the defendant company exceeded its rights when it constructed two-thirds of its roadway over private grounds, but in our opinion this question can not be raised in the proceeding now before us.

As soon as we hear from counsel, the usual order will be made for the filing of exceptions to our findings and conclusions. If the stipulation as to the precautions and respective rights of the parties at the crossing is not agreed upon within fifteen days, we will fix the terms and rights by a decree *nisi*, to which exceptions can be filed. Of course, any agreement submitted by counsel is to be without prejudice to either party.

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Orphans Court of Montgomery County.

ESTATE OF MATILDA DAVIS, DECEASED.

A written agreement made between a number of heirs, certifying to a family agreement in reference to the estate, will not be set aside in the absence of proven fraud.

The decedent in her last illness gave her daughter a check for services rendered to the mother. The daughter held the check until her mother's death. Its payment was then refused by the bank. *Held*, this was a valid gift, and should be paid to the daughter.

ADJUDICATION.

C. Henry Stinson, Esq., for accountant.

Samuel H. High, Esq., for exceptants.

Opinion of the court by SOLLY, P. J., December 9, 1904.

The decedent died February 10, 1903, married and testate, leaving surviving her husband, James Davis, and issue, nine adult children.

Her last will and testament is dated February 7, 1903, and was duly admitted to probate on February 20, 1903. Letters testamentary were granted to Matilda Esterly, a daughter, who is sole executrix.

The testatrix, after directing payment of her debts and funeral expenses out of her estate, devised to her husband and daughter Harriet, share and share alike, the property or real estate situate on the west side of the road leading from Swedeland to Bridgeport; and the residue of her estate, which she described as consisting of a mortgage and bond against Henry Dougherty on a property on Flint Hill road, in Upper Merion township, to secure the sum of $4,000, she bequeathed unto eight of her children (Harriet being excluded), with interest, share and share alike.

At the time of her death decedent was possessed of the bond and mortgage mentioned in the will, and there was a deposit to her credit in the Peoples National Bank of Norristown amounting to $845.31.

It appears that the Dougherty mortgage is for a term of years, and that no portion of the principal has been paid to the executrix. She has received the interest regularly at semi-annual periods since the death of the testatrix.

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Davis's Estate.

The executrix not having filed an account at the end of a year after the grant of letters to her, one of the children petitioned the court to order an account to be filed. A citation was issued, directed to the executrix, to show cause why she should not render an accounting of the management of the estate. In answer thereto she filed the account before the court in the office of the register of wills, in which she charged herself with $4,845.31, the amount of the inventory. She takes credit for the payment of bills for funeral expenses, medical attendance, taxes, debts, tomb-stones, and administration costs, together with the amount of the bank deposit which she paid to Harriet Davis under agreement of the legatees.

There is a separate accounting of the interest received on the mortgage amounting to $300. Commissions on the same are deducted, and there is a balance of $285. Under an agreement of the husband and children the executrix has appropriated the $285 to the payment of debts and expenses, which amounted to $517.08. The mortgage remains intact; and, as a matter of fact, after the executrix paid her sister Harriet the bank deposit, she borrowed from her enough money to pay the debts, and repaid her out of the interest received on the mortgage.

Two of the children filed exceptions to the credit taken for the payment of $845.31 to Harriet Davis, and claim that the accountant should be surcharged with the $845.31, the bank deposit which she paid to Harriet Davis.

EXCEPTIONS.

While there is some conflict of testimony concerning this bank deposit, we are satisfied, after a careful review of all the evidence, that the contention of the exceptants can not be sustained. There is a sort of family quarrel over this money. The husband and five of the children are arrayed on one side, and the other three children on the other. The contention of the latter is that they understood that the money was to be paid to the sister, Harriet, and she was to pay the debts and expenses out of it. In proof they took the witness-stand themselves, and called the accountant, Harriet Davis, and James Davis, Sr., and one or two other children as upon cross-examination. They are bound by their testimony, save where it is flatly contradicted, and then the question of weight becomes material.

The facts concerning this money, as shown by the evidence, are substantially as follows:

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Davis's Estate.

Harriet Davis was employed in Philadelphia, and was earning her own living. Her mother was taken ill a few years before her death, and continued in feeble health the rest of her life. All the daughters save Harriet were married and lived with their families. At the request of her mother, Harriet resigned her employment and came home to assist in keeping the house and nursing and attending to her mother.

On one or more occasions she expressed her intention of giving Harriet something in way of recompense for her care and services. A few days before her death, in the presence of Dr. Miller, her attending physician, Mrs. Esterly, Harriet, and one or more of her children, the decedent gave a check to Harriet for the amount of money on deposit in the Peoples National Bank. There is no allegation of any fraud or trickery about the giving and signing of the check. The money was not drawn from the bank, Harriet having neglected to present the check for payment. When she did so, subsequently to the death of her mother, the bank very properly refused payment.

As there were some debts, funeral expenses, etc., to be paid, and the money in the bank having been given to Harriet, and the mortgage not being due and payable, the matter of getting money to meet the debts and expenses was the subject of conversation in the family.

The husband and all the children, except Mrs. Watters, Mrs. Hart and James Davis, Jr., testify that it was understood and agreed that the money belonged to Harriet, and she would loan the executrix the necessary amount to pay the debts and expenses, and should be repaid out of the interest on the mortgage as it was received. The other three testify that Harriet was to pay the debts and expenses, and whatever was left should be hers.

Mrs. Esterly testifies that she came to her counsel and stated the matter to him; also informing him of the condition of the check, and the inability of Harriet to get the money. He prepared an agreement with reference to the check, and also one providing for the payment of the debts and expenses out of the income or interest of the mortgage. Copies of these papers are attached to the account. The originals were produced at the hearing. They are executed by the husband and all the children, and each signature is witnessed by V. E. Thompson, the station agent at Swedeland.

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Mrs. Esterly says that before the papers were prepared the whole matter was talked over with the brothers and sisters; that she suggested the payment of the debts out of the interest, and all agreed to it. She also says that she told the heirs that their mother had given the money to Harriet in appreciation of what she had done for her, and it was for her absolute use. She further says that she explained the papers prepared by her counsel, and stated to them just what they contained. All of the parties, with the exception of the three who now make objection, agree in their understanding of what the arrangement was, and all of them state that the written agreements contain what was understood and agreed upon.

The misunderstanding, if it may be called such, relates alone to the payment of the debts and expenses—whether they were to be paid by Harriet or with the interest money. It may be that the three children so understood it; but it seems to an unbiased mind as rather strange that the rest of the children understood the arrangement to be that the interest money should pay the debts and expenses. And there is some doubt whether at least one of the three, James Davis, Jr., did not thoroughly understand the whole matter before he executed the agreements, because the station agent and one of the brothers tell about a wrangle over the matter outside the station building and James coming in the room and signing the papers without expressing dissatisfaction or disapproval.

It is unnecessary to go over the evidence in detail. Every one of these parties can read and write. Some of them did read the agreements; others were informed of the contents, and afterwards signed them. The case as presented, therefore, is not one in which it appears that the parties in interest, and who executed the papers, were illiterate, and unable to read and write. We fail to find any evidence of the perpetration of a fraud by Mrs. Esterly on the exceptants. Nor is there any testimony to show that the parties were induced to sign the papers by false representations or through a trick or device.

As already stated, some of the parties read them; to others they were read. But each and every one had the full and free opportunity of reading for himself and ascertaining if they contained the agreements as understood.

Written instruments are presumed to express the real agreements of the parties, and are not to be lightly set aside upon vague

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allegations and uncertain inferences of fraud: Lewis vs. Dunlap, 5 Pa. Sup., 625.

Where it appears that one does not make use of the means of inquiry which were open to him, and did not take the trouble to read the paper which he was executing, he can not be relieved of his negligence. Equitable relief will not be afforded one who alleges mistake into which he has fallen: Bispham's Equity, 5th ed., 280.

These general principles of the law are directly applicable to the case in hand. All the parties had full means of inquiry as to the contents of the papers—opportunity to read them, and to see if they embodied what they purported to be. When they signed them, it must be presumed that they understood them; and in the absence to show that resort was made to a trick or artifice to suppress the contents of the papers, that they truly set forth the agreements.

Where the allegation is that the contents of the instrument which lay open before him when he signed, were misrepresented, and it appears that its terms are unambiguous; that resort was had to no trick or artifice to prevent him from reading it; and if no fraudulent intent is alleged, it should appear that the representation clearly bore the construction he put upon it or that it was intended to be taken by him in that sense or that the other party knew, or ought to have known that he was taking it in that sense, otherwise he is in no better plight and is no more entitled to relief than one who signs an instrument which clearly expresses a different meaning from that which was in his mind: Lewis vs. Dunlap, *supra.*

It is the duty of a person to read a paper before he executes it; or if he can not read, to demand to have it read or explained to him. And if he neither reads it nor demands to have it read or explained to him, he is guilty of supine negligence: Greenfield's Estate, 14 Pa., 489.

In the same case it is said the evidence of fraud must be clear, precise and indubitable to overturn a written instrument; and since the parties are allowed to testify in their own behalf, it has become still more necessary that this important rule should be strictly adhered to and enforced. We are of the opinion that in the absence of clear, precise and indubitable evidence of fraud, and in the further absence of willful and deliberate misrepresentation, as well as in the absence of any evidence of resort to trickery having been made to prevent the exceptants from reading the agreements, they must stand.

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The parties executing them are solemnly bound by them. We hold, therefore, that the exception must be dismissed. The account will be confirmed. When the Dougherty mortgage is realized on, and there is a further accounting, the executrix will so state the account as to show what estate came into her hands, and all the payments she made thereout. The bank deposit was a gift from the decedent to her daughter Harriet.

Court of Quarter Sessions of Montgomery County.

In re Adam C. Stetler.

The special act of April 17, 1846, P. L. 364, extended to Montgomery county by act of March 26, 1853, P. L. 246, prohibits peddling, and the court has no authority to issue a license to peddle in the county of Montgomery.

The prohibition against granting a license to peddle is within the general police power of the state.

Application for a license to peddle.

William P. Young, Esq., for petitioner.

H. Wilson Stahlnecker, Esq., for county treasurer.

Opinion of the court by Swartz, P. J., June 5, 1905.

The applicant is a butcher residing in New Hanover township. He slaughters live stock upon his premises and retails the dressed meats from his wagon throughout different parts or sections of the county of Montgomery.

He desires in the conduct of his business to add cured meats and meat products other than those prepared on his premises. In other words, he intends to buy cured meats and dressed beef for the purpose of selling the same from his wagon as he drives from house to house. He will continue, however, to slaughter cattle, as is customary in the business of a country butcher. The purchase of meats for the purpose of sale is to be an adjunct to his business of a butcher.

He asks the court for a license under the general act of April 2, 1830, P. L. 147. He does not claim that he is disabled from pro-

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curing a livelihood by labor. So far as this provision of the act of April 16, 1840, P. L. 433, is concerned, he contends that it is class legislation and unconstitutional. He takes the position that any citizen of the county who has resided therein for one year is entitled to a license to peddle by paying the fee fixed by law.

The special act for the county of Schuylkill, approved April 17, 1846, P. L. 364, was extended to the county of Montgomery by the act of March 26, 1853, P. L. 246. There is no other act governing hawking and peddling in the county of Montgomery except so far as the method of collecting the penalty is concerned. The act of April 14, 1860, P. L. 715, was extended to the county of Montgomery by act of March 31, 1864, P. L. 166. These acts relate to hucksters. They provide for the granting of a license where a person buys butter, eggs or other provisions in one county for the purpose of sale in another. There is no license required unless the provisions are to be carried to a market outside of the county in which they are purchased. These are not acts providing a license for hawking and peddling in the county of Montgomery.

The act of 1846, extended to Montgomery county by the act of 1853, as already stated, is the only act governing peddling in our county. It reads that "from and after the passage of this act no person or persons shall sell or expose to sale within the county of Schuylkill (and the county of Montgomery), as a hawker, peddler or traveling merchant, any foreign or domestic goods, wares or merchandise, under the penalty of fifty dollars for each and every offence."

This act is a prohibition against granting a license to peddle, and is within the general police powers of the state: Commonwealth vs. Gardner, 133 Pa., 284. This was a declaration made by the court when the act of 1846 was under consideration.

The Bucks county act of March 22, 1862, P. L. 161, is in the exact words of the act of 1846, so far as there is a provision against peddling; and the court held that the refusal to grant a license under the Bucks county act was proper, because the act prohibited all hawking and peddling in said county: Warden's License, 24 Pa. Super. Ct., 75.

If the applicant is a hawker and peddler in doing what he proposes to do, then we can not grant him a license under our anti-peddling license law of 1846.

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Whether meats and butcher's products are included in the terms "goods, wares and merchandise," we are not called upon to decide at this time. It is also questionable whether a butcher who has a fixed place of residence, and delivers his meats to customers, is a peddler or hawker within the meaning of those terms as used in the various acts of Assembly. If the applicant is a peddler, we can not grant him a license; if he is not a peddler, he is not in need of a license.

And now, June 5, 1905, the application for a license is refused.

Court of Common Pleas of Montgomery County.

RHOADS SHEE VS. GEORGE H. WALKER, OWNER, AND WILSON R. KER, CONTRACTOR.

A sub-contractor is not required to file a copy of the specifications with his lien where his contract with the contractor is verbal, and the statement contains the terms and conditions thereof, and the lien makes no reference to specifications or to the terms of the contract between the owner and contractor.

MOTION to strike off lien. No. 31, March T., 1905.

Eqans & Dettra and *J. Eckstein Beatty, Esqs.*, for plaintiff.

Conrad Sheve, Esq., for defendants.

Opinion of the court by WEAND, J., July 3, 1905.

The petition and motion to strike off this lien is on behalf of the contractor, and avers matters of fact for the jury and which might be urged as a defence on the merits.

The question of law is raised by the averment that "the above mentioned lien is defective in that no copy of the specifications had been filed with the lien."

The plaintiff in this case is not a contractor but a sub-contractor under the act of 1901, claiming a lien by virtue of his employment by the contractor "to superintend the erection and construction of the dwelling," etc.

Clause four of section eleven of the act of June 4, 1901, P. L.

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431, provides that the claimant shall file as part of his statement of claim "a copy of his contract or contracts, if in writing, or a statement of the terms and conditions thereof, if any of them are verbal." In this case the contract was verbal and the statement contains "the terms and conditions thereof."

In Knelly vs. Horwath, 208 Pa., 487, it was held that as between owner and contractor specifications made part of the contract and essential to it must be included in statement of claim. In the course of the opinion it is said: "We therefore hold that where the specifications are expressly made a part of the contract or are referred to as part of it, they must be filed with it."

In this case there is no reference in the statement to specifications or to the terms of the contract between the owner and contractor. The ruling, therefore, would seem not to apply to this case.

Thirsk vs. Evans, 211 Pa., 239, is more nearly in point. In that case Thirsk was a sub-contractor, and in his agreement with the contractor there was a reference to the original agreement between the owner and contractor, and in relation thereto provided "which articles, plans and specifications are to be considered as if hereto attached, all information concerning same being known to the subcontractor." Plaintiff had not filed a copy of the specifications with his statement, and a motion was made to strike off the lien. The plaintiff contended that he did not have a copy of the specifications, and was refused them upon request. The court sustained his contention.

It will be observed that in the case under consideration there is no reference to specifications, in which respect it differs from the cases cited, and we are not to assume that plaintiff was in possession of them, or that they were essential to his work.

In the case last cited the question was, "whether the reference in the later contract to the original agreement, plan and specifications made them such a part of the contract between the contractor and sub-contractor as to require that a copy of the same must be filed with the claim."

In this case, as there was no contract in writing or any reference in the claim to the original contract, and it not appearing that plaintiff's labor was essentially connected with the specifications, we conclude that the motion to strike off must be overruled.

The question as to the right of the contractor to make this

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motion has not been urged. See Wetherill vs. Garrett, 140 Pa., 224; Cowes vs. Ralston, 12 Dist. Rep., 438; Kime vs. Walt, 10 Montg. Law Rep., 12; Funck vs. Central Iron and Steel Co. et al., 30 C. C., 256.

And now, July 3, 1905, the motion to strike off the lien is overruled.

H. S. J. SICKEL, SUBSTITUTE ASSIGNEE OF GEORGE R. FLEMING, WHO WAS ASSIGNEE FOR THE BENEFIT OF GEORGE R. DEARBORN, VS. C. H. REED (FORMERLY C. H. GAMBLE) AND BELLA GAMBLE.

The court has no authority to allow the filing of a counter bond in replevin after the time limited by the act of April 19, 1901, P. L. 88, unless the time has been extended by the court within the prescribed time.

MOTION to substitute bond. No. 108, June T., 1905.

J. V. Gotwalts, Esq., for plaintiff.

J. B. Larzelere, Esq., for defendants.

Opinion of the court by WEAND, J., June 12, 1905.

On April 27, 1905, a writ of replevin was served upon defendants. On the same day the defendant, Bella Gamble, handed to the sheriff a paper intended as a counter bond under Section 3 of the act of April 19, 1901. The sheriff left the goods with the defendant. On his return he was informed by the prothonotary that the paper handed him as a bond was not a proper one. On inspection we find that it is not in form or condition as required by the act, of which fact the defendant was at once informed by the sheriff.

On May 3d defendants' counsel prepared a proper bond and forwarded the same to Bella Gamble, one of the defendants, with instructions to have the same executed and returned at once. The new bond was not returned and filed until May 16th.

The petition is to have this bond marked filed *nunc pro tunc* as of April 29, 1905. The excuse for not returning the bond earlier is that Bella Gamble misunderstood the letter of her counsel.

The third section of the act of April 19, 1901, P. L. 88, requires the counter bond to be filed "within seventy-two hours after such

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goods and chattels have been replevied," which time may be extended by the court upon cause shown. In this case there was no request for an extension of time or approval of bond until May 16th, and we find nothing in the act which allows the court to accept a bond after the seventy-two hours without such request made within that period.

The defendant's trouble is caused by her own act. Instead of consulting counsel when served with the writ, she chose to rely on a justice to prepare her bond; and even when she did employ counsel, she neglected to execute and return the bond which he had prepared.

In Lunneman vs. Lunneman, 11 Dist. Rep., 759, it was held that the counter bond must be filed within seventy-two hours after the goods are replevied, and a bond tendered six days after the replevy was rejected. In this case nineteen days elapsed; and as the petition is to file the bond *nunc pro tunc*, it must be refused.

And now, June 12, 1905, the petition is refused.

Orphans Court of Montgomery County.

Estate of Henry Lysinger, Deceased.

Collateral tax should be separately computed against a life tenant and a remainderman and collected from each respectively.

A legacy bequeathed to a trustee to pay income to life tenant and principal at death of life tenant, is entitled to interest on the same from the date of testator's death.

Adjudication.

Freas Styer, Esq., for accountant, and the company as trustee and as guardian,

C. S. Sheive, Esq., for William H. Lysinger, George Lysinger and Mary Ellen Adle.

Opinion of the court by Solly, P. J., January 2, 1905.

Henry Lysinger, a resident of the borough of Norristown, died on or about January 28, 1904, testate, unmarried and without issue.

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Lysinger's Estate.

His last will and testament is dated May 29, 1902, and duly proven February 2, 1904.

A legacy of $4,000 was bequeathed by the will of the testator to the Montgomery Trust Company in trust, to invest and pay the income to his nephew, William H. Lysinger, during life, with the remainder over upon his death to his children; and in default of children, then to those entitled to the residuary of the estate.

The residue of the estate is divided into two equal shares, one of which is bequeathed to the Montgomery Trust Company in trust to invest and pay the income to his nephew, George Lysinger, during life, and the principal at his death to his children or their heirs.

Upon referring to the appraisement of the estate for collateral tax purposes, we find that the appraiser neglected to fix the value of the life estates and the amount of tax thereon. He simply treated the entire estate as if all of it was presently distributable to collaterals. Neither the executor nor its counsel seems to have observed this serious omission, and it has resulted in the payment by the executor of the tax upon the whole estate at this time, when it should have been paid only upon that part of the estate which is distributed now, and not upon that part of it which goes by way of remainder after the death of William H. and George Lysinger, life tenants. We have calculated the tax due by the life tenants, and deduct it from their shares of income. We find that the executor has paid $328.96 for those in remainder, and we see no way it can be reimbursed at this time. It will be obliged to wait until those in remainder come into possession of the legacies, unless they choose in the meantime to pay the company.

William H. Lysinger, the life beneficiary of the legacy of $4,000 bequeathed to the Montgomery Trust Company in trust to invest and pay the income to him, and George Lysinger, who is entitled to receive during his life the income of the residue of the estate, which is given to the same trustee to invest and pay the income to him, claim interest upon the respective funds from the date of the testator's death, for the reason that the gifts of the income are in the nature of annuities.

The whole estate of the decedent at the time of his death was personalty, all but $2,119.47 consisting of interest-bearing securities and certificates of deposit carrying interest. The account of the executors shows that the executor received interest, which accrued

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from testator's death to the time of filing the account, to the amount of $605.32, and after deducting state tax and commissions there is in hand $559.06.

The rule of the common law was that interest upon a legacy could only be claimed after the expiration of one year from death of testator, and the act of February 24, 1834, Section 51, P. L. 83, is merely declaratory of that rule. Whether the gift of the interest of a sum to one for life entitled the legatee to that interest from the date of testator's death seems to have first arisen in Eyre vs. Golding, 5 Binn., 472, and the question was decided in the affirmative. From that time down to Brown's Estate, 190 Pa., 464, there have been a number of decisions, and there has been no substantial departure from the rule. So that it may be considered as settled law that where the interest or income of a fund is bequeathed to one person for life, with remainder over of the principal to another, the legatee for life is entitled to the interest from the death of the testator, unless there is something in the will to the contrary.

The same rule applies where a portion of the residue of the estate is given in trust, with direction to invest and pay the interest to a beneficiary for life: Brown's Estate, *supra*, and cases there cited. The reason for the rule as stated by Gibson, C. J., in Spangler's Estate, 9 W. & S., 135, is that the beneficiary would otherwise get less than was given.

In some of the earlier decisions there appeared to be an intention to limit or restrict the application of the rule to annuities, gifts of annual sums, and the like; but in Hilyard's Estate, 5 W. & S., 30, the bequest was "in trust to place the same out at interest and pay the interest and income thereof, when and as the same shall be got in and received, unto my sister for and during all the term of her natural life," and the rule was held applicable. Other cases followed in the same line (Spangler's Estate, 9 W. & S., 135; Pennsylvania Company's Appeal, 41 Leg. Int., 26), until it was squarely held in Flickwir's Estate, 136 Pa., 374, that there is no substantial difference in legal aspect between the gift of an annuity for life and of the interest or income of a fund for life; nor between the gift simply of interest and of interest payable annually.

It will be observed that the will gives the specific legacy and half the residuary estate to the Trust Company in trust, with direction to invest. As such investment could not be made until after

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distribution, there would be no income for the beneficiaries. That can not deprive them of the interest, especially where, as in this case, the estate was largely composed of interest-bearing securities, and there is more than enough income on hand to pay the annuities: Eichelberger's Estate, 170 Pa., 242. We might well rest our conclusion upon the well considered opinion of Judge Swartz in Baum's Estate, 15 Montg. Law R., 58, where an almost similar question arose.

There being nothing in the language of the will to show a contrary intent, interest is allowed beneficiaries for life on the amounts of the several legacies from the date of the testator's death at the rate of five per centum per annum, that being the prevailing rate as well as the one the securities bore, as we gather from the account outside of the certificates of deposit.

Court of Common Pleas of Montgomery County.

IN EQUITY.

THE CENTENNIAL AND MEMORIAL ASSOCIATION OF VALLEY FORGE VS. JOHN W. WOODSIDE, W. H. SAYEN, EDWARD A. PRICE, HENRY A. MUHLENBERG, SAMUEL S. HARTRANFT, J. P. HALE JENKINS, W. G. BRUMBAUGH, JOHN P. NICHOLSON, W. S. WILSON AND A. H. BOWEN, TOGETHER CONSTITUTING AND KNOWN AS THE VALLEY FORGE PARK COMMISSION.

The charter of the Centennial and Memorial Association of Valley Forge does not require that any land owned by the association shall be held for public use. Whether a use is public must be tested by the inquiry, "Has the public a legal right to the use, which can not be gainsaid or denied or withdrawn at the pleasure of the owner?"

When the commonwealth condemns land at Valley Forge so that the original condition of the military camp of 1777–1778 may be preserved as a public park for the enjoyment of the people of the state, she takes land for public use.

The grounds of the Memorial Association may be included in such condemnation, though the taking of the property may deprive the association of all its lands and property used as a park.

The taking of the land at Valley Forge by the state was not special legislation requiring notice by publication of an intent to apply therefor.

RULE to show cause why a preliminary injunction should not be awarded as prayed for in plaintiff's bill.

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F. G. Hobson, R. H. Koch and *Frederick Barto, Esqs.*, for the plaintiff.

Montgomery Evans and *J. P. Hale Jenkins, Esqs.*, for defendants.

Opinion of the court by SWARTZ, P. J., August 26, 1905.

On July 5, 1878, the Court of Common Pleas of Montgomery county incorporated the Centennial and Memorial Association of Valley Forge. The purpose of the corporation was to purchase, improve and preserve the lands and buildings thereon erected and occupied by General Washington at Valley Forge, and to maintain the premises as a memorial park. The charter of said association was to be perpetual. The association purchased about four acres of ground at Valley Forge, and by this purchase became the owner of the premises known as the headquarters of General Washington at Valley Forge. For a period of twenty-five years the association maintained a park at the headquarters. They employed a caretaker, and charged a small admission fee to all visitors who entered the gate leading into the park.

The defendants constitute the Valley Forge Park Commission, which was created by an act of the General Assembly approved May 30, 1893. Under this act the commissioners appointed were to lay out, preserve and maintain a tract of land not to exceed two hundred and fifty acres, the same to include Forts Washington and Huntingdon. The title to this land was to be vested in the state of Pennsylvania; and the property was to be maintained forever as a public place or park by the name of Valley Forge, so that the same and the fortifications thereon may be maintained as nearly as possible in their original condition as a military camp, and may be preserved for the enjoyment of the people of the said state.

The act in its third section declares that the ground was appropriated for public purposes, and the owners were to be paid by the state according to its value, which was to be ascertained by a jury of freeholders to be appointed by proceedings in the Court of Quarter Sessions in the county in which the said grounds lie.

By the fifth section of the act it is declared that the premises when they shall have passed into possession of the commonwealth may at any time thereafter be used as a camping-ground for the National Guard of Pennsylvania. The commissioners were to provide the necessary conveniences for such camps of the National

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Guard, and to relinquish to the commanding officer, for the time being, all police control over and through said park and grounds.

By a later act the extent of the territory to be acquired was increased to five hundred acres; and by the act of April 7, 1905, P. L. 117, it was increased to one thousand acres.

Under the act of 1905 the commissioners caused a survey and plan to be made, and fixed the location, boundaries and area of ground now to be taken in addition to the land already acquired. This new appropriation by the state includes all the grounds and improvements of the plaintiff association. The plaintiff was notified of the taking of its property, and a jury was appointed by this court to assess the damages to the owner.

The prayer of the bill asks us to restrain the commissioners from entering upon and taking possession of the premises owned by plaintiff association. Counsel for plaintiff assign four grounds in support of their contention that the defendants have no right to appropriate the four acres of land in controversy.

First. That the taking of plaintiffs' property is not for a public use within the meaning of the constitution of the state.

Secondly. That such taking is destructive of the franchise of the plaintiff association and in violation of the constitution of the United States, which forbids the impairment of the obligation of a contract by any state.

Thirdly. That the plaintiff already preserves the grounds for the enjoyment of the people, and that the purpose of the defendants is not calculated to advance the public interests or public use.

Fourthly. That the legislation under which the defendants propose to act is special legislation.

The able argument of counsel for plaintiff has not convinced us that there is any valid objections to the proceedings of the defendants. Under the law and the admitted facts we can not sustain any one of the four propositions advanced.

That the state is taking property for public use when it appropriates the hallowed grounds of Valley Forge as a public place or park to be preserved for the enjoyment of the people of the state, can not admit of doubt. By such use of the sacred grounds the state impresses upon the hearts of the people the value of the sacrifices made by the suffering soldiers in the establishing of our republic. By this park we show a proper recognition of the great

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things that were done there in the momentous days of the winter of 1777 and 1778. The action of the state teaches our children the love and veneration due to the heroic sacrifices made for our liberties. "The greater the love of the citizen for the institutions of his country the greater is the dependence to be placed upon him for their defence in time of necessity, and it is to such men that the country must look for its safety." It is not only the right but the duty of the state to kindle a spirit of patriotism in the heart of every citizen. This question was carefully considered by the highest court of the republic in United States vs. Gettysburg Electric Railway, 160 U. S., 668. The national government attempted to appropriate certain grounds for the preservation of the Gettysburg battle-ground. The Gettysburg electric railway operated its road within the territory which the government desired to condemn. The railway company contended that the purpose of the government was not an appropriation for public use. The court held otherwise, and the property of the railway used for public traffic had to yield to the higher public use of the government.

Article XVI, Sec. 3, of our constitution answers the second proposition of the plaintiff. It declares, "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as property of individuals." Of course, where corporate property, devoted to public use, is to be appropriated, it must appear that the new use is of greater benefit to the public: Towanda Bridge Co., 91 Pa., 216; Bridge Company vs. Clinton County, 157 Pa., 379.

There is no greater sacredness in the grant of a franchise to a corporation by legislative power than of a grant to an individual, and such franchise may be taken when the public necessity requires it on making suitable compensation: Mills on Eminent Domain, Sec. 42. Unfortunately for the plaintiff's argument, there is no holding for public use under the charter of the Centennial and Memorial Association of Valley Forge. There is therefore no question of greater public use.

There is no trust for public use imposed under the plaintiff's charter. Whether a use is public or not must be tested by the inquiry, "Has the public a legal right to the use, which can not be

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gainsaid or denied or withdrawn at the pleasure of the owner": Market Co. vs. Railroad Co., 142 Pa., 586. Tested by this inquiry, no trust was at any time imposed on the property of the plaintiff. The association is not required to admit to its park the public. The association purchased the property, and may hold it for the sole use of its members. True, the public has always been admitted on the payment of a small fee; but the test is, Could the association be compelled to admit visitors? Is the property or any part of it held in trust for the public?

The allegation that "the purpose of the defendants is not calculated to advance the public interests or conserve the public use," is not founded upon law or fact. The commissioners under the act of the Legislature are bound to maintain the park "for the enjoyment of the people of the state." The plaintiff association may find it hard to surrender a property upon which so much care was bestowed for many years, but condemnation for public use has no regard for the personal taste or desires of the owner of the land. No doubt the activity of the association stirred up a greater interest in Valley Forge. The people of the state through this organization were aroused to their duty. The members of the association have the consolation that through their activity Valley Forge Park was made possible. It is to their credit that public sentiment was quickened, and the state of Pennsylvania will now do for Valley Forge much more than individual enterprise could expect to accomplish.

The remaining objection relates to the charge that the defendants are proceeding under an invalid statute—that is, that the act of 1905 is special legislation. But local or special laws are not necessarily invalid. The constitution provides how certain local laws may be passed. "Notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected shall be situated."

If the acts under which the defendants are proceeding constitute local legislation requiring publication, where is the proof that this was not done? Where an act of Assembly was passed and approved we must assume that all the necessary formalities were complied with. Unless the failure to give public notice is admitted, we can not assume that this requisite was neglected: Chalfant vs. Edwards, 173 Pa., 251.

It is not necessary, however, to base our conclusion upon this

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technical defence. Legislation which has for its purpose the conferring of a benefit alike upon every person in the state can not constitute local legislation. The right vested in the Legislature to take property for public use can not be hampered or fettered by a condition that the state must give notice by pnblication before the Legislature can act.

We also notice that one of the purposes in establishing the park at Valley Forge was to provide a camping ground for the National Guard. This may be of considerable weight in determining whether the state is taking property for public use. If the National Guard is to receive military training and discipline, a place must be provided for that purpose. The state is interested in securing a proper place to train her soldiers. If the Legislature appropriates property for a permanent military camp, is it not taking property for public use? The environments of Valley Forge, with its historic associations, ought to instill the principles that make good soldiers.

And now, August 26, 1905, the application for a preliminary injunction is refused.

NORRISTOWN TRUST COMPANY, ADMINISTRATOR D. B. N. C. T. A. OF SARAH BURNS, DECEASED, SUCCESSOR TO SILAS JONES, DECEASED, WHO WAS EXECUTOR AND TRUSTEE UNDER THE WILL OF THE SAID SARAH BURNS, DECEASED, THE SAID SARAH BURNS BEING THE EXECUTOR AND SOLE LEGATEE AND DEVISEE OF EPHRAIM BURNS, DECEASED, VS. HENRY G. LENTZ, SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF BENJAMIN LENTZ, REAL OWNER AND TENANT IN POSSESSION.

The property of an intestate passes at his death to those legally entitled to the succession subject to the claims of creditors and to the laws in force for administering it; but if there be no debts to pay and no distribution needed, administration is not indispensable to give dominion over the property. Still less is the necessity for administration c. t. a. where the legatee in his life-time took possession of a bond under an absolute bequest of all the testator's estate, although the judgment on the bond stood in the name of the testator at the legatee's death.

The death of an executor does not disqualify a witness as to matters occurring between himself and the executor, in a suit by the testator's estate, although such witness is also the executor of the estate against which the suit is brought.

Where a person acts as the agent for three parties, it must be presumed, until the contrary is shown, that his acts and intentions were honest, and that he was faithful in his duty to all three parties. We can not assume that money was embezzled at any stage of the transaction until some fraudulent act is shown.

HEARING before the court. No. 81, March T., 1904.

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Hillegass & Larzelere, Esqs., for plaintiff.

Henry Freedley and *E. L. Hallman, Esqs.*, for defendant.

Opinion of the court by SWARTZ, P. J., August 3, 1905.

FINDINGS OF FACTS.

1. On February 23, 1876, Benjamin Lentz executed a bond and warrant in favor of Ephraim Burns in the sum of eight hundred dollars to secure the payment of four hundred dollars in one year from the date thereof. On July 13, 1876, judgment was entered in the prothonotary's office upon the warrant of attorney.

2. Ephraim Burns died on November 28, 1879, testate. His widow, Sarah Burns, was the executrix of his will. He gave all his estate, real and personal, to his wife, "to be hers absolutely."

3. The Lentz judgment was not marked to her use in her lifetime, but she took charge of the bond and had the paper in her possession to the time of her death—that is, from 1879 to April 28, 1894, the day of her death. She received the interest from year to year and entered the payments upon the bond. These receipts were given in her individual name and not as executrix of her husband. This continued for fifteen years.

4. Mrs. Burns died testate, and Silas Jones was her executor. Her estate was given in trust to her executor, the income thereof to be paid to her daughter for life, and at the daughter's death the principal sum to be distributed to persons named or their heirs.

5. The bond passed into the hands of Mr. Jones, and he received the interest from year to year and gave his receipts. These receipts were signed either "Silas Jones," "Silas Jones, executor and trustee," or "Silas Jones, executor of Sarah Burns."

6. Benjamin Lentz died August 16, 1897, testate, and letters were issued to Henry G. Lentz as executor of the will. Payments of interest were made upon the bond by Benjamin Lentz to Silas Jones, executor of Sarah Burns; and after the death of said Benjamin Lentz his executor also paid the interest on the four hundred dollars to said Silas Jones, executor of Sarah Burns.

7. Silas Jones died May 5, 1903. The Norristown Trust Company was on February 2, 1904, appointed administrator d. b. n. c. t. a. of Sarah Burns, deceased. The bond with its endorsements of interest was found among the papers of Silas Jones, and by his executor delivered to the administrator d. b. n. c. t. a. of Sarah Burns.

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8. Benjamin Lentz, as well as his executor, Henry G. Lentz, treated the bond as a debt due to Sarah Burns or to her executor, Silas Jones. Both paid interest to Mr. Jones as the legal holder of the security.

9. In the spring of 1900 Henry G. Lentz needed seven hundred dollars to pay out a legacy in the estate of Benjamin Lentz. In an interview with Silas Jones the latter agreed to furnish the money, together with the additional sum of four hundred dollars to pay off the Burns judgment. Henry G. Lentz as executor was to execute a mortgage for eleven hundred dollars, so as to pay off the judgment and the legacy. Mr. Jones produced Miss Emma Roberts, who was to take the mortgage. On March 1, 1900, the parties met at the office of G. R. Fox, Esq. Mr. Jones produced the mortgage; it was signed by Henry G. Lentz, and Mr. Jones then paid out seven hundred dollars to discharge the legacy. The balance of four hundred dollars remained in the hands of Mr. Jones as payment of the judgment. An attempt was made to satisfy the judgment. It failed, because the record showed a judgment of Ephraim Burns against Benjamin Lentz. Mr. Jones then promised he would receipt the bond, and then send this old paper—the bond showing the payments of interest marked "A. H. F."—to Henry G. Lentz. Afterwards frequent demands were made of Mr. Jones for this paper. His reply was that he could not find it, and would send it as soon as he could find it; that the judgment was paid and that there was nothing due on it; and that the paper belonged to Henry G. Lentz, executor, and would be sent to him as soon as it was found. In the settlement at the office of Mr. Fox Miss Roberts was not present, but Mr. Jones represented her. Mr. Jones was an attorney, and also acted for clients in lending or borrowing money.

10. After the settlement in the office of Mr. Fox no interest was paid on the four hundred dollars to the Burns estate, nor was any demand at any time made for interest or principal in the lifetime of Mr. Jones. Henry G. Lentz, executor, paid interest to Mr. Jones on the eleven hundred dollars secured by the Roberts mortgage. Mr. Jones gave receipts for this interest to the Lentz estate. At least two such payments were received by Mr. Jones.

11. There is no evidence submitted that Mr. Jones embezzled the four hundred dollars. We are not referred to any account filed by him or his legal representatives showing whether he charged

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himself with the money or not, as the executor of Sarah Burns, deceased.

12. Henry G. Lentz was a son and legatee of Benjamin Lentz. Charles Lentz was also a son and legatee of Benjamin Lentz.

CONCLUSIONS OF LAW.

1. Under the facts found we hold that Mrs. Burns had such title and ownership to the judgment that her executor could collect the same, and that payment to him was a satisfaction of the debt.

2. Henry G. Lentz was a competent witness as to the matters occurring after the death of Sarah Burns.

3. Charles Lentz was a competent witness as to matters occurring after the death of Sarah Burns.

4. We find that the judgment was paid on the day the settlement was held in the office of G. R. Fox, Esq. Silas Jones having retained the four hundred dollars as payment, and being the person legally entitled to receive the money in satisfaction of the debt, his retention of the money with the declaration that the debt was paid was an appropriation of the money in his hands in payment of the debt.

5. The defendant is entitled to judgment in his favor with the costs of suit.

ARGUMENT IN SUPPORT OF OUR FINDINGS AND CONCLUSIONS.

Mrs. Burns exercised every right of ownership in the claim of her husband against Benjamin Lentz. The husband's will gave to the wife all the estate, real and personal, absolutely. She collected the interest and receipted for the same in her individual name. At her death Benjamin Lentz recognized her title, because he paid the interest to her executor. If she did not reduce the claim to her possession, why should Benjamin Lentz recognize her executor as having any title to the security?

Ephraim Burns was dead for twenty-five years, and there can be no valid contention that this asset of his estate is needed to pay debts in the administration of his estate. The executor of Mrs. Burns held the bond for years. The equitable title to a judgment may vest in a stranger to the record without any written assignment: Levering vs. Phillips, 7 Pa., 387.

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The action is in the name of Sarah Burns as sole legatee and devisee under the will of Ephraim Burns. This is in effect a suit in the name of Ephraim Burns to the use of Sarah Burns.

There was no necessity for an administration d. b. n. c. t. a. in the estate of Ephraim Burns to pass the title in the judgment to the estate of Mrs. Burns. Property of an intestate passes at his death to those legally entitled to the succession, subject to the claims of creditors and to the laws in force for administering it; but if there be no debts to pay and no distribution needed, administration is not indispensable to give dominion over the property: Roberts vs. Messinger, 26 W. N. C., 70; McLean vs. Wade, 53 Pa., 146. Still less is the necessity for administration where the legatee in her life-time took possession of the property under an absolute bequest of the same to her.

Henry G. Lentz was a competent witness as to matters occurring after the death of Sarah Burns. True, he was interested as a legatee in his father's estate; but children and heirs may testify in favor of such estate where a claim is presented against the same: Smith vs. Hay, 152 Pa., 377; Crosetti's Estate, 211 Pa., 495.

But it is said that Henry G. Lentz is incompetent because the party to the thing in action is dead and his right thereto has passed to a party on the record who represents the interest of the deceased in the subject in controversy, and because the interest of Henry G. Lentz is adverse to the right of the decedent. We agree to this proposition, because the act of May 23, 1887, P. L. 158, so declares. But how far is he incompetent? The same act answers "to any matter occurring before the death of said party." We allowed no evidence from Mr. Lentz as to anything that transpired in the life-time of Mrs. Burns. The person is disqualified "whose interest shall be adverse to the said right of such deceased." Who is the deceased person under this act and the facts before us? It must be the deceased party to the subject in controversy whose right thereto has passed by his own act or by the act of the law to a party on the record who represents his interest. The subject in controversy is the judgment or the interest which Sarah Burns has therein. It is her interest in the claim or debt which has passed to the Norristown Trust Company which represents her interest. Silas Jones was not a party to the thing or contract in action. He represented the party who owned the thing; he was not a party interested in the thing it-

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self. The only interest he had in the matter was his compensation for services he might render in the administration of the estate. The fourth section of the act of 1887 declares that the right to compensation by an executor is not such an interest as will make him incompetent as a witness. We can not assume that Mr. Jones embezzled the funds of the Sarah Burns estate, or that any such controversy will arise. There is no evidence whatever from which we could find misconduct on his part. If in truth he received the money, then for aught we know it remained in his hands at the time of his death to meet any claim that might be made upon his estate, or might be made against him as executor of Sarah Burns. We must assume that he did his duty, and that he has no interest in the matter beyond his commissions.

In Cox vs. McKean, Administrator, 56 Pa., 243, a defendant was allowed to testify against a claim presented by an administrator. It was shown that the defendant was a trustee of funds placed in his hands by the decedent, and that the defendant, because of his representative position, could prove this fact under the act of March 27, 1865. The act of 1887 is an enabling act, and did not render incompetent persons who were competent witnesses prior to its enactment. It follows that Silas Jones would have been a competent witness against the estate of Benjamin Lentz. The converse must be true, as was declared in Sargent vs. Insurance Company, 189 Pa., 346: "As a matter of course, if the opposite party was competent in such circumstances it must have been upon the assumption that the agent would have been competent if he had survived and the opposite party were dead." That is, under the act of 1887 the rule must work both ways.

The name of Silas Jones appears in the caption of the action, but he is not a necessary party to the record. There was no occasion to use his name. The test of incompetency, however, does not depend upon the fact whether a name appears in the title of the suit. The test is whether the deceased person was a "party to the thing or contract in action."

Silas Jones was in effect no more a party to the thing in action than an agent who acts for a principal, and afterwards dies; and yet in those cases the death of the agent does not affect the competency of a defendant who is sued by the principal: American Life Insurance Co. vs. Shultz, 82 Pa., 46.

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It is argued that there is inequality if Henry G. Lentz is allowed to testify to a transaction between himself and Silas Jones, executor, who is not here to answer for himself. The same argument applies with equal force where an agent dies with whom the contract was made. All witnesses are competent unless they fall within one of the exceptions or exclusions under the act of 1887. A careful reading of the act does not to our mind afford any ground for the exclusion of the witness, Henry G. Lentz, except as to matters occurring prior to the death of Sarah Burns. We must follow the act of 1887, even if it works out an apparent hardship. Inequality is not the test that must control its construction: Smith vs. Hay, 152 Pa., 383.

The evidence of Henry G. Lentz and his brother Charles shows that this judgment was paid. We can only repeat what was said in Roberts vs. Lentz, 21 Montg. Law Rep., 79. Mr. Jones had in his possession four hundred dollars belonging to Henry G. Lentz, executor. With the assent of Lentz he retained the money in payment of the Sarah Burns judgment. Jones not only demanded the right to hold it for that purpose, but he declared again and again that the judgment was paid. He attempted to satisfy the judgment because it was paid. He failed to enter the satisfaction not because the debt remained unpaid but because he believed the record was not in proper condition to allow his satisfaction. He was acting in a triple capacity. He was the agent for Miss Roberts to see that the mortgage was properly executed and the money handed over to Mr. Lentz; he was the agent of Mr. Lentz to procure the loan; and he represented the estate of Sarah Burns when he retained the money in satisfaction of the debt. It must be presumed, until the contrary is shown, that his acts and intentions were honest; that he was faithful in his duty to all three parties: Lerch vs. Bard, 162 Pa., 316. When he took the money of Miss Roberts, it was his duty to hold on to it until a proper security was recorded in her name. When the mortgage was duly executed and recorded, it was his duty to pass over the money to Mr. Lentz. When Mr. Lentz told him to retain the four hundred dollars to liquidate the judgment, it was his duty to receive it as the executor of Sarah Burns; and when he assented ro the retention, that moment the judgment was paid. There is no evidence that he failed in his duty as to any of these acts. We can not assume that he embezzled any of the money before reaching the office of Mr. Fox, where the settlement was held. There is

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no evidence upon which such a finding can be based. It is not shown that Mr. Jones embezzled the four hundred dollars at any time. How can we find that the money was embezzled at any particular stage in the various transactions?

And now, August 3, 1905, the foregoing report of our findings and conclusions is filed in the office of the prothonotary, who will give notice to the parties or their attorneys; and if no exceptions are filed to the findings and conclusions within thirty days after service of such notice, he will enter judgment for the defendant with costs of suit.

Court of Common Pleas of Lancaster County.

Estate of Adam M. Ranck.

Where the constitution of the United States leaves in the states and in Congress concurrent power over a particular subject, and Congress has exercised its power over such subject, the control of the states over that subject is prohibited.

The Pennsylvania insolvent act of June 4, 1901, P. L. 404, is suspended by reason of the existence of the Federal bankrupt act of July 1, 1898, and does not become operative as to the persons and subjects to which the Federal act applies.

Since a farmer may become a voluntary bankrupt under the Federal bankrupt act of July 1, 1898, the bankrupt act is applicable to the assigned estate of a farmer, and excludes the Pennsylvania insolvency act of June 4, 1901, P. L. 404, together with the repealing clause therein.

A judgment, therefore, given by the assignor within four months prior to his assignment, is not deprived of its lien by the act of 1901, and is a preferred claim on the distribution of the estate.

A sale of the assigned real estate by order of court must have been made under the act of February 17, 1876, P. L. 4, and interest on such judgment ceased at the absolute confirmation of the sale.

Exceptions to auditor's report.

H. M. Houser and *Coyle & Keller, Esqs.*, for exceptions.

M. G. Scheaffer and *B. C. Atlee, Esqs.*, for estate.

Opinion of the court by Landis, P. J., January 14, 1905.

On March 31, 1903, Adam M. Ranck made a deed of voluntary assignment for benefit of his creditors to the Northern Trust and Savings Company, and subsequently M. G. Scheaffer was joined as one of the assignees. Prior thereto, namely, on December 23,

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1902, the assignor confessed a judgment to Caroline R. Ranck, his wife, for $3,000, which was entered to November Term, 1902, No. 135. This judgment was a compromise of a claim for $5,200, then held by the wife against him, and the giving of it was accompanied by articles of separation between the parties. The property passing by virtue of the deed of assignment consisted of both real and personal property, and the real estate was sold by the assignees under an order of this court. Having filed their account, an auditor was appointed to distribute the balance remaining in their hands; and the judgment of Caroline R. Ranck, which was claimed in full as a lien upon the real estate, was disallowed as a preference, because the auditor was of the opinion that the insolvency act of June 4, 1901, P. L. 404, applied, and that as the judgment of Mrs. Ranck was confessed within four months of the assignment for an antecedent debt she obtained no priority thereby, and was only entitled to a dividend as a common creditor. Two most important questions therefore arise: the first, whether, the assignor being a farmer, the bankruptcy act is inapplicable to his case, and he is therefore solely under the state laws; and secondly, if the insolvent act is suspended in this respect by the bankrupt act, whether the repealing Section 42 of the act of 1901 is also suspended.

Under Section 4 of the United States bankrupt act of July 1, 1898, it is provided that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt," and that "any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, . . . may be adjudged an involuntary bankrupt." As then the constitution of the United States empowered Congress to pass a bankrupt act, it was held by the Superior Court in Potts vs. Smith Manufacturing Co., 25 Pa. Super. Ct., 206, that where such constitution leaves to the states and in Congress concurrent power upon a particular subject, and Congress has exercised its power over the subject, the control of the states in this regard is prohibited. In that case an execution appears to have been issued against the defendant company, whereupon an assignee for the benefit of creditors, made under the said act of 1901, obtained a rule to set the execution aside. It did not appear that the defendant, or any of its creditors, had applied for the benefit of the Federal bankrupt act. It was held, nevertheless, that the state act was suspended by reason of the existence of

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the Federal act, and that the state act did not become operative as to persons and subjects to which the national act applied.

It, therefore, would seem to me that, although the assignor in this case was "a person chiefly engaged in farming or the tillage of the soil," he was subject, nevertheless, to the Federal bankrupt act, as by his voluntary petition he could have come within its provisions. Otherwise, there would be a shifting application of the state act; the debtor, when desiring, taking the benefit of the act of Congress, or, when he thought differently, making an assignment, as in this case, under the state law. If, then, the control of the states is prohibited, so far as the Federal act applies—and it certainly applies —to voluntary bankruptcies, the state act is not in force, pending the existence of the former; and the auditor was in error in so deciding. If this be a correct proposition, it follows that the judgment of Sarah R. Ranck was a valid lien against the assignor's real estate, and should have been paid in its order upon the record. It should have been allowed to her in the distribution; and because it was not, the exceptions filed in her behalf are now sustained.

If, then, the act of 1901 is suspended during the pendency of the act of Congress, does the same principle apply to the repealing section as well as to the rest of the act? In Climax Machine Co. vs. Sheesley, 13 District Rep., 649, it has recently been held by Judge Weiss, of Dauphin county, that the Federal act, suspending, as it does, the state act, produces this result; and it would seem to me that the conclusion thus arrived at is a most reasonable one. The act of 1901 repeals practically all acts of Assembly in this state relating to assignments, and great confusion would be introduced into the practice, and equal uncertainty in titles to real estate, if it was held that, although the essential features of the act were not in force, the repealing clauses were nevertheless effective. The view expressed in Tua vs. Carriere, 117 U. S., 201, that the enactment of the insolvent act of Louisiana, during the life of the bankrupt act, "would have been merely tantamount to a provision that the former should take effect on the repeal of the latter," seems to cover the subject, and carries with it the whole of the act where inconsistency arises and not a part of it.

The act of 1901 to this extent having been thus determined to have been suspended by the Federal act, the sale of the real estate under an order of this court must have been actually made in pur-

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suance of the act of February 17, 1876, P. L. 4, for no power existed in the court to grant such an order of sale except by virtue of this statute. The sale having been made, the liens of the judgments resting upon the real estate were discharged by reason thereof, and interest upon them ceased at the absolute confirmation of the sale. In Tomlinson's Appeal, 90 Pa., 224, and Carver's Appeal, 89 Pa., 276, this very point, and under the same act, was decided, the Supreme Court holding that "the date of the confirmation of the sale is the day when the land is converted into money, and the liens thus discharged must be paid according to priority on that day": Burkholder's Appeal, 94 Pa., 522; Myers's Estate, 192 Pa., 458; Shimp's Assigned Estate, 197 Pa., 128. It would follow, therefore, that the exceptions filed on behalf of Edwin Haldeman, a creditor, should also be sustained, and the report referred back to the auditor for correction in this regard.

The exceptions which we have above enumerated are therefore sustained, and the report is recommitted to the auditor to make distribution in accordance with this opinion.

Exceptions sustained.

Orphans Court of Montgomery County.

Estate of Reuben D. Umstead, Deceased.

U. died intestate, unmarried, and without issue, leaving several brothers and issue of two deceased brothers, who left children, one of whom was also deceased leaving issue a daughter, a grandniece of decedent. *Held*, this grandniece was entitled by representation to the share of her deceased parent.

No. 16, November Stated Court, 1901.

Freas Styer, Esq., for the estate.

E. L. Hallman, Esq., for Montgomery Trust Company, guardian of Ella Slemmer, a grandniece.

Opinion of the court by Solly, P. J., January 12, 1905.

The decedent died on August 7, 1903, intestate, unmarried, and

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without issue. He left to survive him as his heirs at law several sisters and brothers and issue of two deceased brothers.

Noah Umstead, one of the brothers who died in his life-time, left surviving him issue three children. He had another child, Sallie Slemmer, who at her death left issue a daughter, Ella Slemmer, a grandniece of the decedent.

A question of distribution arises. Is Ella Slemmer a grandniece of the decedent, entitled to receive the share which her deceased mother would have received were she living? She is entitled to the share of her deceased mother by representation.

Prior to the act of April 27, 1855, she would not have inherited any portion of the estate. The second section of that act provides that among collaterals, when by existing laws entitled to inherit, the real and personal estate shall descend and be distributed among the grandchildren of brothers and sisters, and the grandchildren of uncles and aunts by representation; such descendants taking equally among them such share as their parent would have taken if living. It was decided, therefore, in Krout's Appeal, 60 Pa., 380, that when the intestate leaves brothers and sisters and the children of deceased brothers and sisters, the latter take by representation the share their parent would have been entitled to if living; and the children of a deceased nephew or niece take by representation the share of their parents. The act of 1855 constituted the grandchildren of brothers and sisters and the children of uncles and aunts additional classes of collateral heirs as contradistinguished from next of kin: Hayes's Appeal, 89 Pa., 256. And in Lane's Appeal, 28 Pa., 487, the Supreme Court held that the effect of the act of 1855 is to introduce a new class of collateral heirs—those who were one generation too remote to take under the act of 1833. Under this act the grandchildren of brothers and sisters take by representation: Perot's Appeal, 102 Pa., 257. To the same effect is Brenneman's Appeal, 40 Pa., 115.

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Court of Common Pleas of Montgomery County.

WILLIAM P. LAWRENCE vs. BERNARD SMITH.

A judgment rendered against a person after his death is voidable, and will be reversed at the suit of the personal representatives or heirs of the deceased.

PETITION to strike off judgment. No. 166, March T., 1905.

Neville D. Tyson, Esq., for plaintiff.

Wanger & Knipe, Esqs., for defendant.

Opinion of the court by WEAND, J., September 22, 1905.

The sheriff made return to the scire facias sur mortgage that he had made service at the dwelling-house of said Smith on April 17, 1903. Upon this return judgment was entered on April 17, 1905, and a levari facias issued on May 8, 1905. Said Smith died November 30, 1904. The death of Smith was not suggested, nor were his executors substituted.

In Warder vs. Tainter, 4 Watts, 270, it was said "to render the judgment of the Court of Common Pleas regular and irreversibly valid, it is not necessary that the defendant should be actually alive at the time of trial and rendition of the judgment against him; it is sufficient that it appear by the record that he was so, though in fact he was dead and proof of the fact is offered." The authorities are abundant to show that in no case is a judgment rendered by a court of general jurisdiction considered void on account of the death of the defendant having taken place before the rendition of it; that at most it is only voidable, and may be reversed on writ of error, but in no other way, by any one who is entitled to such writ.

"A judgment rendered against a person after his death is reversible, if the fact and time of death appear on the record; it is voidable, and not void": Yaple et al. vs. Titus et al., 41 Pa., 195.

"But such judgment is erroneous and reversible by the personal representatives or heirs of the deceased by a suitable proceeding commenced for that special purpose": Stevenson vs. Virtue, 13 Pa. Super. Ct., 103; Sleeper vs. Hickey, 26 Pa. Super. Ct., 59.

There is no denial of the time and death of Bernard Smith, the defendant, nor can his legal representatives be accused of laches, for the judgment was only entered two years after the return of service,

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and the levari followed within a month—May 8, 1905. This petition was filed May 15th. As the petitioners by their subsequent petition claim to have a defence, and it appearing that the entry of judgment was erroneous and the judgment voidable, the prayer of the petitioners is granted.

And now, September 22, 1905, the rule to strike off judgment and subsequent proceedings is made absolute.

Court of Common Pleas of Montgomery County.

Fitzwater White vs. Philadelphia and Reading Railway Company.

A conveyance to a railroad company for railroad purposes embraces every injury to the entire tract necessarily resulting from the construction of the railroad as originally located, and for the lawful exercise of the right of the company to extend its works within the right of way to meet the demand of increasing traffic.

The plaintiff claimed that by reason of the cleaning of defendant's gutters and scraping of the slope his lateral support had been removed. The work was not negligently done. As defendant acquired title from plaintiff's predecessor, the damage was of the character contemplated in the conveyance to defendant.

Motion for judgment *non obstante veredicto.* No. 27, March T., 1904.

John Faber Miller, Esq., for plaintiff.

Montg. Evans, Esq., for defendant.

Opinion of the court by Weand, J., September 22, 1905.

By deed dated March 15, 1854, John Faringer conveyed in fee to the North Pennsylvania Railroad Company a strip of ground sixty-six feet in width on which its line of railroad was constructed. The defendant company has succeeded to the rights of the North Pennsylvania company.

By deed dated July 1, 1903, Frank P. Johnson et ux. conveyed to plaintiff certain premises lying between the easterly side of the Morris road and the westerly side line of the North Pennsylvania land above mentioned.

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The common predecessor in the title to both tracts was John Faringer.

In constructing its road, first with a single track, the North Pennsylvania company found it necessary to dig a deep cut in the rear of and along the White premises, and afterwards double-tracked its road. This cut is about twenty-five feet in depth.

The defendant company finds it necessary to frequently clean the gutter along the westerly side of its line, and scrapes the sloping bank above the same.

For the purposes of this case it has not entered upon plaintiff's land; but because of its cleaning and scraping the top of the slope on plaintiff's land has slidden or fallen down toward the bottom, the effect being to eat into plaintiff's land for the average distance of about five and one-half feet. Between the date of plaintiff's purchase and the bringing of this suit the top of Mr. White's slope has receded for a distance of from fifteen to eighteen inches. Claiming that the defendant company is a trespasser, the plaintiff sues for damages. The contention of the defendant is that under the circumstances it is not liable, there being no evidence of negligence.

Ruppert vs. Railroad Co., 25 Pa. Super. Ct., 613, was an action of a similar character, and it was there said: "At the time of the removal of the lateral support complained of the defendant was the owner in fee simple of the ground through which the cut was made, up to and along Ruppert's line; and in this legal sense, therefore, the parties must be regarded as private individuals, and their rights in the premises regulated accordingly." The principle governing such cases is that "the owner of land has an absolute right to the lateral support of his ground in its natural state, and for its withdrawal he may recover the actual damages thus caused to the land." The defendant contends that this case is not applicable, inasmuch as the defendant company did not acquire title from Ruppert, the plaintiff.

The question then is narrowed down to this, Did the conveyance from Faringer operate as a release of all damages suffered in consequence of the lawful construction and operation of the railroad? Was an injury of this character contemplated in the granting of the land for railroad purposes?

Plaintiff's rights are no greater than those of John Faringer. There is no evidence of negligence on the part of defendant com-

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pany, and they have kept on their own ground to do necessary work.

When Faringer sold he knew that slopes would be required, that gutters must be provided, and from the nature of the ground there would be a sliding of the land from rains, snows and storms, probably increased by the cleaning of the gutters. A conveyance to a railroad company for railroad purposes embraces every injury to the entire tract necessarily resulting from the construction of the railroad as originally located, and for the lawful exercise of the right of the company to extend its works within the right of way to meet the demand of increasing traffic: Davis vs. Railroad Co., 26 Pa. Super. Ct., 264.

An absolute deed of conveyance is of equal if not greater weight with a release of damages. If Faringer required lateral support, he should have stipulated for it; not having done so, he waived his right to consequential damages arising from a lawful use of the ground conveyed.

The cases of Boothby vs. Androscoggin, &c., Railroad Co., 51 Me., 318, and Horstman vs. Covington and Lexington Railroad Co., 18 B. Monroe (Ky.), 218, cited by counsel for defendant, sustain his contention of non-liability. The cases cited by plaintiff are applicable to contests between individuals, or where there is no release or conveyance from plaintiff to a railroad company. In the Ruppert case, *supra*, the company did not derive title from him.

If the land in this case had been condemned instead of bought, the loss here claimed would have been an element of damage.

The case is one of first impressions, and appears not to have arisen in our state.

And now, September 22, 1905, judgment for defendant on the reserved point *non obstante veredicto.*

LOWER MERION TOWNSHIP VS. WILLIAM HENRY SUTTON.

The record of conviction for the violation of a borough or township ordinance should refer to the ordinance, and at least show the substance of it; and also contain a finding that defendant had violated the special act complained of.

CERTIORARI. No. 71, June T., 1905.

Rowland Evans, Esq., for plaintiff.

John W. Bickel, Esq., for defendant.

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Opinion of the court by WEAND, J., September 22, 1905.

At the argument of this case counsel for the plaintiff, appellee, raised the point that the writ had been issued without an allowance by the court. No formal motion, however, was made to quash the proceedings on that account. The reason assigned why the writ was improperly issued is that the proceeding is criminal in its nature and of a summary character; and that the question is ruled by the decision of the Superior Court in Com. vs. Antone, 22 Super. Ct., 412, citing Com. vs. Betts, 76 Pa., 465.

The proceeding is based on the act of June 10, 1901, P. L. 551, under which the person against whom the proceeding is instituted can be arrested on a warrant, detained in a lock up or county jail, and in default of the payment of judgment may be sentenced to the township lock-up or county jail.

It is of a highly penal nature, and being a new law the defendant may well have been misled in suing out his writ. Under the circumstances we allow the writ *nunc pro tunc.*

The seventh exception is that the justice erred in issuing a warrant of arrest instead of a summons; but, as we have already stated, the act of 1901 authorizes either a warrant or summons.

The third and sixth exceptions are the more serious. The first alleges that "the justice erred in giving judgment for the township and imposing a penalty on defendant"; the second, that "the transcript from the record of the justice does not set forth the ordinance alleged to have been violated, or show that the offence is within the said ordinance."

If we adopt the view of the attorney for the township that the proceeding is in the nature of a criminal proceeding, we find from authority that the record must show specifically what act the defendant has committed in violation of the ordinance; and judgment should be entered against him on that account. In this case, however, the record recites no ordinance from which we can find that the facts alleged have violated it; nor does the judgment show how the defendant has done so.

The finding simply is, "After hearing gave judgment for township and imposed penalty of $10, and a further sum of $15 for three days after twenty-four hours notice and costs of suit, which is $7.94, making a total judgment of $32.94." We find no warrant of authority

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in the act of 1901 for the imposition of a penalty of $15 after notice. The penalty by that act is not for a day, but for the act itself.

In Com. vs. Nesbit, 34 Pa., 398, it was said, "It is essential that a summary conviction shall contain a finding that a special act has been performed by the defendant; and that it shall describe it or define it in such a way as to individuate it and show that it falls within an unlawful class of acts."

The justice has set out the evidence, but does not state that he finds it to be true, or what part of the ordinance has been violated, or how or by whom violated. Really, the testimony would show that another than the defendant was guilty of the offence charged.

In Reid vs. Wood, 102 Pa., 312, the judgment was, "Whereupon the said chief burgess inflicts the penalty of twenty dollars and costs," reciting the ordinance. The proceeding was reversed, the court saying, "In order to sustain a summary conviction for violation of a borough ordinance it is necessary that the record of conviction should contain a finding that the special act complained of has been performed by the defendant; and that it should describe or define it in such a way as to distinguish it, and show that it falls within an unlawful class."

The same principle is held in Com. vs. Davison, 11 Super. Ct., 130, where the court also said, "All the technical rules governing summary convictions do not apply with the same strictness to such a proceeding"—i. e., an action for a penalty. But the act of 1901 expressly says, "Warrants shall be returned forthwith; and upon such return like proceedings shall be had in all cases as are or may be directed by law in relation to summary convictions."

It nowhere appears by the record that any ordinance was offered in evidence. Minutes of council that an ordinance was read and evidence that it was published, were offered; but this does not show what the ordinance contains.

The record should show at least the substance of the ordinance, so that the court can judge whether the particular act complained of is a violation of its provisions: Flood vs. Ashley Borough, 5 Kulp, 462; Com. vs. Hill, 12 C. C. R., 559.

And now, September 22, 1905, the third and sixth exceptions are sustained and the proceedings reversed.

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HATFIELD AND TOWAMENCIN TURNPIKE COMPANY VS. COUNTY OF MONTGOMERY.

In the condemnation of a turnpike road the damages should not be determined solely by the amount it would cost to put the road-bed in place. A property is not always worth what it costs to build it.

A jury should not consider the various elements of damage as items to be added but as matters to be considered in their bearing upon the value of the property as a whole. When a jury begins to itemize for the purpose of adding up the various items it is pretty sure to duplicate the actual damages.

Where a verdict is clearly against the weight of the evidence the court should not allow it to stand.

A court on hearing a motion for a new trial, judges of the action of the jury on the testimony on both sides and considers whether too much or too little weight has been given to features, for the whole of the testimony in view of its intrinsic character, and the court must say on a calm consideration of it all whether justice does or does not require a new trial.

MOTION and reasons for a new trial. No. 154, June T., 1904.

Louis M. Childs and *Henry M. Brownback, Esqs.*, for plaintiff

J. P. Hale Jenkins, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., September 18, 1905.

On May 26, 1904, the plaintiff turnpike was condemned and freed from tolls. The jury of view valued the property taken and assessed the damages at thirty-seven hundred and ninety-five dollars. From this assessment the turnpike company appealed to the Court of Common Pleas. A trial before a jury in said court resulted in a verdict in favor of the plaintiff company for ten thousand three hundred and seventy-five dollars ($10,375). The roadway is about one and eight-tenths miles long.

The witnesses differed widely in their estimates of the value of the physical road-bed. The highest figures were those of Mr. Cooper, $11,500. He, however, did not make the careful examination of the road-bed that some of the other witnesses gave to it. The civil engineer of the plaintiff fixed this value at $8,200, and the engineer of the county at $4,250. These values were exclusive of the culverts and the damage to the toll-house. The average annual income for the last four years, after deducting all expenses, was two hundred and thirty-six dollars.

The stock of the company was not on sale in the market. Only one sale was testified to. The stock then brought five dollars. The par value of the stock was $25, and three hundred and forty-five shares had been issued. No dividends were paid, but the company in the construction of its roadway incurred a debt of

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twelve hundred forty dollars. This debt was fully paid at the time of the trial out of the net income of the company. The roadbed was in a fair condition to pay dividens in the future.

The officers of the company in their return under oath to the Auditor General valued their property at twenty-five hundred and seventy-five dollars.

Under the evidence submitted we fail to comprehend how the jury could find a verdict in damages amounting to ten thousand three hundred and seventy-five dollars.

The officers of the company were perhaps the best judges of the value of their property. They knew the condition of the roadbed, the cost of its maintenance, and the receipts from tolls. When, under oath, they fixed the value at $2,575, due weight should have been given to their judgment. We are aware that there is a temptation to undervalue property when the owner knows such value forms the basis of a tax assessment, but we can not believe that the interest of these officers influenced their judgment to such an extent that they valued their property at one-fourth of its true worth. Again, a property is valued largely according to its earning capacity. This element should have due weight in fixing the damages, especially so when a turnpike road is the subject under consideration.

The net income of corporate property is ordinarily the best test of its value. The value of a turnpike road depends largely upon the fact whether the receipts from tolls will meet the expenses of maintenance and will leave a margin for distribution among the stockholders. It will not do to value a property of this character solely at the sum it would cost to put the road-bed in place. A property is not always worth what it costs to build it.

Where a verdict is clearly against the weight of the evidence the court can not allow it to stand. "A court on hearing a motion for a new trial, judges of the action of the jury on the testimony on both sides and considers whether too much or too little weight has been given to features, for the whole of the testimony in view of its intrinsic character," . . . "and the court must say, on a calm reconsideration of it all, whether justice does or does not require a new trial:" Grant vs. Commonwealth, 71 Pa., 505. It appears to us, from the size of the verdict, that the jury must have taken the several elements of damage as items to be added, and not as matters to be considered in their bearing upon the property as a whole

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—that is, they valued the road-bed and added to that the capitalization of the net income of the property.

It will not do to divide up a property in this way to ascertain its value. The road-bed is valuable because there is a right to collect tolls, and tolls can not be collected without a road-bed. The property must be valued as a whole. The road-bed and franchise are dependent upon each other for their value. When a jury begins to itemize and sums up the various items, it is pretty sure to duplicate damages.

We considered with great care the various elements that constitute the plaintiff's property, and we are of opinion that the property as a whole was worth at the time it was taken the sum of fifty-five hundred dollars. We can not allow the verdict to stand for a larger sum. If the plaintiffs are not willing to accept this sum a new trial will be granted. We were disposed to grant a new trial, but upon further reflection we concluded that ample justice can be done to both parties without the annoyance, delay, and expense of a new trial.

The property produced $308 during the last year the turnpike was operated before the condemnation. This was in excess of the average annual income. At the same time the evidence shows that the net income was increasing from year to year rather than decreasing. A property that would cost from five to eight thousand dollars and produces a net income from two hundred and fifty dollars to three hundred dollars is fairly worth fifty-five hundred dollars. A higher estimate of the damages, would, in our judgment, be excessive to the county.

And now, September 18, 1905, if the plaintiff will, within fifteen days, file a disclaimer and remit all of the verdict over and above fifty-five hundred dollars a new trial will be refused, otherwise a new trial will be awarded as prayed for.

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Court of Common Pleas of Cumberland County.

PHILADELPHIA, HARRISBURG & PITTSBURG R. R. CO.'S BOND.

Railroads—Eminent domain—Bond—Foreign surety company.

A foreign surety company will not be accepted as a sole surety on a bond of a railroad entered in condemnation proceedings, where no power is found in such company's charter authorizing it to become surety in such cases.

IN RE PETITION of the Philadelphia, Harrisburg & Pittsburg Railroad Co. for approval of bond to secure payment of damages by reason of taking of the land of the estate of William R. Gorgas, deceased. C. P. Cumberland Co. Sept. T., 1905, No. 5.

Wetzel & Hambleton, for petitioner.

F. E. Beltzhoover, and *S. B. Sadler*, contra.

SADLER, P. J.—Private property may be constitutionally taken for the needs of a railway by the payment of a sum agreed upon to the owner or by the giving of a bond with sufficient security for the payment of the damages, which may accrue to the owner by reason of such appropriation of his land.

Upon the giving and approval of a bond, the company acquires "as clear and perfect a right to the easement as if it has paid therefor in cash:" Hoffman's Ap., 118 Pa. 512.

By so doing "the owner's title to the land is divested:" Fischer *v.* R. R. Co., 175 Pa. 554.

Thereafter his only security is the bond. He has no lien or claim upon the land as such.

Indeed, where both the railway and the sureties became insolvent, relief was denied to the owner in an application to strike the bond from the record, or by restraining further entry upon the lands by the railway until compensation was paid: Wallace *v.* R. R. Co., 138 Pa. 168.

This being the law, it becomes the imperative duty of the court, to whom a bond is presented for approval, in cases where land is proposed to be taken by railways, to exercise the greatest care in passing upon the sufficiency of the sureties.

It should be entirely satisfied that the security tendered is ample, and when a corporation is offered as such, that it has the unquestionable power to engage in the undertaking.

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In the present case, under the exceptions filed, not only is the question raised as to the amount of the bond, but also whether under the powers conferred upon the United States Fidelity & Guaranty Company, by its charter (which is offered as the sole surety), it is authorized to bind that corporation, as is proposed.

The fourteenth section of the act of assembly of the state of Maryland, approved March 19, 1896, by which the United States Fidelity & Guaranty Company was incorporated, provides, amongst other things, that it may "become sole surety in all cases where, by law, two or more sureties are required for the faithful performance of any trust or office."

Excepting the provision in the eleventh section of said act, which enacts that "The capital stock as paid in shall be taken and considered as the security required by law for the faithful performance of their duties," when certain trusts may be committed to it, the only authority given to the corporation to act as sole surety, where the law requires two, is that above referred to in the said fourteenth section.

But the answer is made that the insurance commissioner of Pennsylvania has given a certificate, which authorizes the said United States Fidelity & Guaranty Company to become sole surety as proposed.

It needs no argument to show, nor does it even require a declaration from us, that the insurance commissioner of Pennsylvania cannot confer powers upon the said company to enter into obligations, which are not authorized by the charter, which it holds from the commonwealth which created it.

Indeed, the second section of the act of assembly of the state of Pennsylvania, approved June 26, 1895, provides "that such company to be qualified to so act as surety or guarantor must be authorized under the laws of any state or county where incorporated."

Besides, the charter of this surety company authorizes it to act as administrator, executor, etc., and that "its capital stock shall be taken and considered as security for the faithful discharge of its duties, provided the court shall not deem it necessary to require further security." While an act of the legislature of the state of Maryland, approved April 7, 1892, forbids any corporation acting in such trust capacity, without bond or security from incurring

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"the liability of a surety upon any bond of any sort or description."

Whether the United States Fidelity & Guaranty Company is now, or ever has acted as such, has not been made known to us. That it has the power so to do is plain and undoubted, and profitable business of this sort, it may properly be presumed, is not likely to be refused by corporations.

Again, the charter of the company nowhere, in definite terms, authorizes it to become security for the payment of damages that may be assessed for the taking of land by a railway for its purposes.

When the legislature of Pennsylvania enacted the law approved June 27, 1895, conferring powers upon "certain fidelity, insurance, safe deposit, trust and saving companies," it was deemed by that body to be wise, if not absolutely necessary, to give this power in express terms, as appears by clause 12 of the first section of the same, to wit: "To become security for the payment of all damages, that may be assessed and directed to be paid, for the lands taken in the building of any railway, or for the purposes of any railway, or for the opening of streets or roads, or for any purpose whatever, where land or other property is authorized by law to be taken." And it will be observed that the sixth clause of the said act had already given such corporations the power "to become sole surety in any case where by law one or more sureties may be required, for the faithful performance of any trust, office, duty, act, or engagement," and in the ninth clause, "to act as security for the faithful performance of any contract entered into with any person or municipal or other corporation, or with any state or government, by any person or persons, corporation or corporations."

In Altoona and Beech Creek R. R. Co.'s Bond, reported in 24 Pa. C. C. R. 561, Justice Bell said: "And if the legislature deemed it necessary to specifically empower home companies to go on right of way bonds, ought not foreign companies to be required to exhibit a like specific authority, and not content themselves with relying on general terms, which might be construed as not sufficiently comprehensive, to include rights of way bonds . . . if such specific enactment was deemed necessary to enable home companies to become such surety, ought we to accept the bond of a foreign company which exhibits no such specific authority?"

The enormous liabilities incurred by bonding companies (those of the United States Fidelity & Guaranty Company exceeding four

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hundred millions, on Dec. 31, 1904, while its capital and surplus were a little in excess of two millions) gives additional ground for the courts to be cautious, where the slightest doubt exists as to the power of the company to act as surety, as proposed in this case.

The testimony was uncontradicted, at the hearing, that the damages of the Gorgas estate would amount to at least $2,500; we cannot, therefore, fix the bond at a less sum.

It is therefore ordered that the bond filed in this case shall be in the sum of $2,500 with sufficient surety.

We have also come to the conclusion that petitions for the approval of bonds in this and like cases should set forth not only that the railway "desires" to enter upon, and take certain land, but also that the company has surveyed, ascertained, located, fixed and marked the same, and has also determined the taking of the same to be necessary, for purposes which should be designated, by due corporate action.

While the approval of a bond does not establish the right of a railway to permanently appropriate the land, it does give it the right to enter upon and occupy it, at least temporarily, and the land-owner ought not to be subjected to the annoyance or expense of litigation, unless, prima facie, a legal right is shown on the part of the petitioner to appropriate.

This view does not conflict with any authorities cited by the petitioner, unless it be that of R. R. Co. *v.* Jones, 2 Dist. Rep. 760, and with the unqualified statement in the opinion in that case we do not concur.

While this view may seem at variance with what was held in the cases of the petitions of the Northern Central Railway Co., praying for approval of bonds in cases of Church et al., yet it is to be observed that in those cases injunctions had been granted restraining entry upon the lands, and the mere approval of the bonds gave no right of entry, nor were the exceptions seriously pressed, and little consideration was given them.

It is suggested that the petition in this case be amended so as to conform to the views above set forth, and leave is hereby given the petitioner so to do.

And now, May 23, 1905, exceptions numbers 1, 3, 4, 8 and number 5 as amended are sustained.

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Court of Common Pleas of Montgomery County.

PERKIOMEN RAILROAD CO. VS. ALBERT BROMER.

Where the execution of a written agreement has been induced upon the faith of an oral stipulation, made at the time but omitted from the written agreement, though not by fraud, accident or mistake, parol evidence of the oral stipulation is admissible to add to or change the terms of the written agreement.

The declarations of an agent in such cases are admissible not for the purpose of establishing the truth of the facts stated but as representations by which the principal is as much bound as if he made them himself, and which are equally binding whether the fact be true or false.

Even if an agent exceed his authority, yet if his principal seek to take the benefit of the bargain so made he must adopt the contract as his agent made it.

The principal can not approbate and reprobate the contract. He can not at the same time take the benefit which it confers and repudiate the obligations which it imposes.

MOTION for a new trial and for judgment *non obstante veredicto*. No. 11, March T., 1905.

Montg. Evans, Esq., for plaintiff.

J. A. Strassburger, Esq., for defendant.

Opinion of the court by WEAND, J., October 22, 1905.

In 1869 the defendant conveyed to plaintiff a strip of land for railroad purposes, but since then he has remained in possession of all the land, except that occupied by the tracks of the railroad.

This action is brought to obtain possession of the entire tract. Defendant admits the conveyance but claims possession until plaintiff fulfills a contract which it is contended was made by plaintiff's agent, and without which the conveyance would not have been made. The road separates defendant's property and leaves about three acres which cannot conveniently be reached except by an overhead crossing. It is contended by defendant that when the president of the railroad, acting as right of way agent, obtained the release of the land, it was agreed that defendant should have a crossing, and that this agreement was not inserted in the deed because the agent stated that it was unnecessary as the law would give it to him anyhow.

If A purchases a farm from B, who is in possession, and B makes a deed without receiving the price, is it equitable that B should be ousted, at the instance of A, before receiving the price?

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If the deed could be reformed, or if the facts as alleged by defendant constitute a defence, the verdict was proper. Plaintiff's contention is, that evidence was not competent to explain the deed, neither fraud, accident nor mistake being alleged, and that Mr. Seipt, acting either as president or agent, could not bind the company in the manner claimed.

The jury were carefully instructed as to the kind of evidence necessary to sustain defendant's claim. The subsequent agreement spoken of by p'aintiff, was confirmatory of defendant's evidence as to the original agreement.

"Where the execution of a written agreement has been induced upon the faith of an oral stipulation, made at the time but omitted from the written agreement, though not by fraud, accident or mistake, parol evidence of the oral stipulation is admissible to add to, or change the terms of the written agreement." Ferguson vs. Rafferty, 128 Pa., 337. The agreement was proven by two witnesses and corroborating circumstances, and the jury found the evidence to be "clear, precise and indubitable."

As to the second point made by plaintiff, we cite Singer Mfg. Co. vs. Christian, 211 Pa., 534: "The declarations or admissions of an agent in such cases are admissible, not for the purpose of establishing the truth of the facts stated, but as representations by which the principal is as much bound as if he made them himself, and which are equally binding, whether the fact be true or false: Phillips on Evidence, 73; Hannay vs. Stewart, 6 Watts, 487; and where a principal is bound for the acts or declarations of his agent, it is generally for the reason that said acts or declarations have led up, or been the inducement to, or explain, or qualify, or form part of some contract, or have caused some act to be done upon the faith thereof": B. and O. Relief Ass'n vs. Post, 122 Pa., 579.

This principle clearly covers the theory of the case relied upon by the defendant. His contention depends upon the representations of the agent, made at the time the contract was entered into, and as the inducing cause thereof, and therefore, under the authorities cited, the declarations of the agent were admissible, not for the purpose of establishing the scope and character of his agency, but as showing the inducing cause of the contract relied upon by the defendant, and binding upon the plaintiff company. The plaintiff in the present action is seeking to enforce the contract

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made by its agent, and even if, as a matter of fact, that agent exceeded his authority, yet, if the plaintiff company seeks to take the benefit of the bargain so made, it must adopt the contract as its agent made it; Keough vs. Leslie, 92 Pa., 424; Caley vs. R. R. Co., 80 Pa., 363. This principle is very well stated in Bristow vs. Whitmore, 9 H. L. Cases, 391, wherein Lord Kingsdown said: "The principal can not approbate and reprobate the contract. He can not at the same time take the benefit which it confers and repudiate the obligations which it imposes."

We treated this case as a contest for possession and the verdict only establishes the claim of defendant to that extent. If the verdict stands, the cost to plaintiff and the other difficulties suggested are of plaintiff's making, and therefore no defence.

The occupation of part of the land by defendant, is for necessary and proper purposes caused by the manner in which the property is divided by the plaintiff company.

And now, October 22, 1905, the motions for new trial and for judgment *non obstante veredicto* are overruled.

Orphans Court of Montgomery County.

Estate of Samuel Shaner, Deceased.

A recovered judgment against B. Subsequently B's father died testate, and by his will he devised and bequeathed the residue of his estate, real and personal, to his children in equal shares, and gave his executors authority to sell real estate and make conveyance. After the probate of the will B assigned all his right, title and interest in the estate to C, his heirs, executors, administrators and assigns. A's judgment was afterwards amicably revived. The real estate was sold by the executors, and brought into their account. A and C claimed B's share of the proceeds of the real estate. *Held*, (1) there was no equitable conversion under the will; and (2) that the assignment conveyed B's interest in the real estate and proceeds of its sale to C, and the latter was entitled to B's distributive share.

Adjudication.

E. L. Hallman, Esq., for Dr. James D. Graber, assignee of the interest of Samuel S. Shaner, a legatee; also for said legatee.

J. A. Strassburger, Esq., for William Z. Hunsicker, a judgment creditor of the said Samuel S. Shaner.

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Shaner's Estate.

Opinion of the court by SOLLY, P. J., November 3, 1905.

Samuel Shaner, a resident of the township of Frederick, died on or about the 31st day of January, 1904, testate. His last will and testament is dated the 9th day of December, 1902, and was duly probated on the 10th day of February, 1904.

Who is entitled to the distributive share of Samuel S. Shaner, one of the children of the testator, has given rise to contention. It is claimed by Dr. James D. Graber under an assignment, and by William Z. Hunsicker upon a judgment. It was shown at the audit that Hunsicker recovered a judgment against Shaner in the Court of Common Pleas of this county on October 7, 1885, upon a bill single dated August 4, 1884, for $131, which was duly revived from time to time, the last revival being March 2, 1904. The claim is for the face of the judgment, with interest at the rate of five per cent. from the date of the bill single. On February 8, 1904, nearly a month before the Hunsicker judgment was revived, Shaner, being indebted to Dr. Graber, executed and delivered to him an assignment of all his "right, title and interest in said estate [Samuel Shaner, deceased], both real, personal and mixed, of whatsoever nature the same may be, and to his heirs, executors, administrators and assigns." The assignment was duly acknowledged but not recorded, and notice of the same given to the executors.

The third clause of the will devises and bequeaths the rest, residue and remainder of the estate (debts and funeral expenses having been ordered paid and a legacy given to a daughter in the preceding clauses) to the testator's children in equal shares. In the clause appointing the executors they are given full power and authority to sell any or all real estate and make conveyance.

Subsequent to the revival of the judgment and the execution of the assignment the executors sold the real estate of which the testator died seized, and received the purchase money, which is included in their account before us. Hunsicker claims that the real estate vested in the children at the death of the testator by the terms of the will, and that upon the revival of his judgment against Samuel it became a lien upon his undivided interest; and the executors having sold the land, the purchase money in their hands retained its character as realty, and Samuel's share is bound by the judgment. On the other hand, Dr. Graber takes the position, first, that the power of sale given the executors worked an equitable conver-

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sion of the land into personalty; and second, if it did not, then the assignment conveyed the interest of Samuel in the land to him, because it is to be given the force and effect of a deed of conveyance.

Whether the assignment operates as a conveyance of the right, title and interest of Samuel S. Shaner in the land devised to him and the other children of the testator by the third clause of the will, is the real question to be determined. If it does, then his share of the proceeds of the sale must be awarded to Dr. Graber, because the assignment antedates the revival of the Hunsicker judgment. It was no lien on the land when the assignment was made.

The contention of Dr. Graber that the authority conferred on the executors to sell the real estate works an equitable conversion, can not be sustained under any of the authorities. The direction to sell is not positive; there is no necessity to sell in order to execute the will; and there is no blending of the real and personal estate, the creation of a fund out of both and the bequest of the fund as money. One of these three requisites must appear: Hunt's and Lehman's Appeal, 105 Pa., 128; Irwin vs. Patchen, 164 Pa., 51; Sauerbier's Estate, 202 Pa., 187; Rauch's Estate, 21 Pa. Super. Ct., 60. The sale by the executors, therefore, did not convert the land into personalty. I am of the opinion that the proceeds of the land sold are realty; and had the judgment of Hunsicker been duly revived, and a lien obtained before the assignment to Dr. Graber, it would have been entitled to payment.

The assignment of the right, title and interest of Samuel S. Shaner in the estate, "both real, personal and mixed," passed the title to the real estate and to the proceeds of the subsequent sale of it. It was the intention of the parties that the entire interest of Shaner in the estate, of whatever nature, should pass to Dr. Graber by the instrument. The language of the paper is apt, precise and unequivocal, and no other rational interpretation can be placed on it.

"Assign," as defined by Webster, means to allot, to make or set over, to transfer, to sell or convey: 1 Words and Phrases, Judicially Defined, 559. "No precise technical words are required to be used in creating a conveyance. The use of any words that amount to a present contract of bargain and sale is all sufficient. Whatever may be the inaccuracy of expression, or the inaptness of the words used in an instrument, in a legal view, if the intention to pass the

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title can be discovered the court will give effect to it and construe the words accordingly. The word 'assign' is defined 'to make or set over to another, to transfer, or to assign property or some interest therein': 2 Black. Com., 326. The word 'assignment' means the act by which one person transfers to another or causes to vest in another his property or interest therein; the transfer or making over the estate, right or title which one has in lands and tenements: Black Law Dict., 97; Burrill on Assignments, Sec. 1": Harlowe vs. Hudgins, 195 S W. Rep, 364. The words "transfer" and "assign" are not the usual operative words in a conveyance of real estate, but are sufficient to transfer the title: Sanders vs. Ransom, 20 Southern Reporter, 530.

In Woodward's Estate, 1 Chester Co., 417, an expectant heir assigned his interest in his father's estate to one to whom he was indebted. The language of the assignment was, "I do hereby assign, transfer and set over unto G., his heirs and assigns, all my right, title and interest in and to the estate of my father, and in and to all legacies or distributive shares coming to me at the death of my said father." The share of the son in the estate of the father was claimed by the assignee under the assignment and by sundry judgment creditors of the son whose liens were entered on the day the father died. An auditor appointed to make distribution of the son's share filed an elaborate and exhaustive report, citing many authorities, and holding that the son's interest as an heir of the father's real estate passed by the assignment. His report was sustained by the Orphans Court of Chester county. There is no difference in principle between that case and the one now under consideration, and the law cited is applicable here. The claim of William Z. Hunsicker must be rejected, and the share of Samuel S. Shaner awarded to Dr. Graber.

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Court of Common Pleas of Montgomery County.

MARTIN J. COX VS. SCHUYLKILL VALLEY TRACTION COMPANY.

Where the testimony of the plaintiff's witnesses makes out a clear case for the jury by positive evidence, it matters not that the contradictory proofs may be strong on the part of the defendant, the issue is for the jury and not for the court.

Where witnesses are interested in an approaching train, and give attention to it by watching for it or listening for it, and then state that certain signals alleged to have been given were not seen or heard by them, such evidence is more than mere negative testimony.

MOTION for judgment in favor of defendant upon the question reserved by the court. No. 44, December T., 1904.

H. I. Fox, Esq., for plaintiff.

Larzelere, Gibson & Fox, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., October 16, 1905.

We reserved the question whether there "is any evidence to be submitted to the jury upon which the plaintiff is entitled to recover."

The plaintiff was injured by a trolley-car as he was crossing the tracks. It became necessary to amputate his leg about three inches above the ankle. The jury found a verdict in his favor for twenty-five hundred dollars.

The plaintiff intended to board the car as a passenger. The car had a guard or safety-rail next to him, so that it was necessary to cross the tracks and enter the car from the opposite side. The tracks of the railway at the place of the accident crossed from one side of the public highway to the other. There was no intersecting highway at this point, but the cars were accustomed to stop there when any persons desired to enter or leave a car. The point was opposite a hotel, and the cars frequently discharged and received passengers at the place of the accident.

The plaintiff charged the company with negligence in the operation of the car which injured him. The statement of the plaintiff alleges that the car was run at an excessive speed and without a head-light. More than three hundred yards east of the place of the accident the car crossed an overhead railroad bridge, and from the bridge to the point of the accident there was a clear, unobstructed view. From the bridge the car came down a steeply descending grade; but just before the plaintiff was struck the grade changed to

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a slightly ascending one. The car in its passage from the bridge to the point of the accident was in darkness—that is, the lights in the car went out. This was due to the trolley-pole slipping from the wire, and also probably to the interruption of the power or electric current for a few seconds. The accident occurred between 9.30 and 9 45 o'clock in the evening. The night was very dark.

There was evidence on the part of the plaintiff that the car was behind time, and came down the hill at unusual speed; that it ran very fast—unusually fast. The conductor came to the plaintiff at the time of the accident. While the plaintiff was on the ground, where the car had thrown him, the former made the remark that he was "late and wanted to make up time."

We eliminated the question of speed from the consideration of the jury, and we also told the jury that if the head-light was burning the plaintiff could not recover. We concluded that the plaintiff was guilty of contributory negligence if he stepped in front of a moving car that was in full view for more than three hundred yards before it reached him. This may have been a more favorable view for the defendant company than was warranted by the law and the evidence. It may have been a question for the jury whether the plaintiff was negligent even if the head-light was burning. The night was dark. The plaintiff testified that he stopped, looked and listened before he entered upon the tracks; and the car was dark so far as there were any lights within the car: McGovern vs. Union Traction Co., 192 Pa., 344. Cars, however, are allowed to run fast, especially in country districts; their office is to conduct passengers rapidly from one point to another. The accident occurred on a public highway about one-half mile below Norristown, in the township of Plymouth. Whether were we right or wrong, the defendant company had the benefit of our ruling.

We presented the case to the jury whether the company was negligent if it ran without a head-light, and whether the plaintiff was negligent in stepping in front of the car even if it was running without the head-light.

The running of this dark car rapidly down a steep grade with the head-light out—that is, not lighted—was clearly evidence of negligence for the consideration of the jury. We said to the jury, "I call your attention to the other charge of negligence, that this company did not have a proper light as a head-light upon the car;

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because, gentlemen of the jury, if there was nothing about this car to notify a man who stopped, looked and listened, he might have used proper care, and yet have received no information that a car was close at hand. And therefore, if he attempted to cross, you might find that it was not through his negligence but because the company did not give him the protection that it ought to have given him when running upon this highway."

It is claimed that there was no sufficient evidence that the head-light was not lighted to submit that inquiry to the jury. Let us examine the evidence on the part of the plaintiff. If this testimony made out a clear case for the jury by positive evidence, it matters not how strong the contradictory evidence of the defendant may have been. It was then a question for the jury to determine which side they would believe or which side carried conviction to their minds.

The plaintiff and the witness Krier were on the hotel porch waiting for an up car. The plaintiff testifies that Krier said, "'Come on, Mart.' So I got up and walked out. You could not see anything along the line, and I stopped; and I stopped there for quite a little bit, and I walked across and I was about making my last step when the car struck me." Krier says when he called on plaintiff to come on the trolley was on the hill. Therefore, when plaintiff looked the car must have been within his view; and if he saw nothing along the line, the plaintiff (if he tells the truth) failed to see the car because the car was without any light. He says he did not see the car at all. He was asked, "Did you look in the direction from which the car was to come?" He answered, "Yes, sir." Question. "What did you stop there for?" Answer. "I wanted to see whether there was anything coming or not. I could not see anything." Question. "Why did you say you stopped?" Answer. "I could not see anything coming; it was all dark." The question was repeated later on in the examination, and he answered again "to see whether I could see anything coming. I could not see anything coming down."

Mr. Krier testified: Question. "Did you look in that direction?" Answer. "I looked, but I didn't see no car. I did not see it from the time I seen it on the hill." Question. "Did you see any head-light?" Answer. "No, I did not." Question. "You saw no head-light?" Answer. "I saw no light whatever to my knowl-

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edge. I looked down and didn't see no car after I seen it on the hill." Question. "Why couldn't you see it with a head-light on?" Answer. "I could not see a head-light when there was none, I don't think." Question. "Suppose there was a head-light?" Answer. "I could have seen the car." Question. "You could have seen the car?" Answer. "Yes, sir." Again he said, "I did look, and surely I could have seen a head-light if there was one burning."

Mrs. Matz was a passenger in the car, and says there was no head-light burning. She looked for the reflection from the head-light. Question. "You could not see the head light, of course?" Answer. "You could see the reflection if there was any." Question. "Did you try this night to see the reflection of the head-light?" Answer. "Yes, sir. . . . I had my eyes open. I would have seen the light if it would have been there." As the car within was in total darkness, a head-light, if burning, would be the more visible.

It is claimed that the evidence of the plaintiff's witnesses is negative testimony, and therefore of no weight. I can not agree to this. Where persons are waiting and watching for a car, and are looking in the direction of the approaching car, and the car is right in their presence, it will not do to say that their evidence is negative when they declare the car had no head-light burning, and was in such complete darkness that it could not be seen at all. There was some evidence of a negative character given by the witnesses seated on the hotel porch. They had no occasion to watch for the car, and they were not interested in its movements. One of the witnesses, however, passes a little beyond the negative line. He noticed the car at the lower crossing and observed the speed. He saw no lights on the car. He took no notice to any on the car. On cross-examination he said that he saw the car at the lower crossing—that is, before it reached the point where the accident occurred. Question. "How came you to see it there if no light was lighted?" Answer. "I was looking that way; I was looking right toward the trolley track." Question. "Then you could see it without lights?" Answer. "Yes, from the light from the hotel—the reflection." Question. "Without any lights on the trolley at all you could see it?" Answer. "Yes, sir." If he watched the car and saw it only by reason of the reflected light from the hotel, it would seem to follow that there was no head-light on the car. An approaching

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car without any lights in the car and on a dark night will surely disclose its presence by the burning head-light. The head-light will be the more brilliant in appearance because of the surrounding darkness.

We were careful to call the attention of the jury to the difference between negative and positive evidence. Where witnesses are interested in an approaching train, and give attention to it by watching for it or listening for it, and then state that certain signals alleged to have been given were not heard by them, their evidence, under such circumstances, is not merely negative: Quigley vs. Canal Co., 142 Pa., 388. So we may say the witnesses Cox and Krier were interested in the arrival of the car, and their attention would be attracted by any signal or approaching head-light. Common experience teaches that such persons will observe warnings when others with no object in awaiting the car might not hear or notice the signals or the approaching head-light: Daubert vs. R. R. Co., 199 Pa., 345.

Under the disputed evidence we do not see how the court could have instructed the jury to render a verdict for the defendant. We may think that the evidence in support of a lighted head-light is stronger than the opposing testimony; but this belief will not justify us in entering judgment for the defendant on the question reserved. No other motion is pending before us on the record.

And now, October 16, 1905, the motion for judgment in favor of the defendant on the question reserved is overruled; and it is ordered that judgment be entered for the plaintiff on the verdict, upon the payment of the jury fee.

FORREST F. SPECK VS. LANSDALE AND NORRISTOWN ELECTRIC RAILWAY COMPANY, AND ALVIN HILL AND ROBERT B. KEYS, THE RECEIVERS THEREOF.

A receiver is an officer of the court; he acts in a representative capacity. He is not required to file an affidavit of defence.

The court may make rules requiring an affidavit of defence by one sued in a representative capacity, but in the absence of such rule he is deemed not to be within the spirit of the law requiring an affidavit. This was the law before the passage of the act of May 25, 1887, and this act did not change the practice.

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Speck vs. Electric Railway Co. et al.

RULE to strike off judgments as to the receivers. No. 110, June T., 1905.

A. R. Place, Esq., for plaintiff.

Evans & Dettra, Esqs., for defendants.

Opinion of the court by SWARTZ, P. J., October 18, 1905.

The receivers filed no affidavit of defence, but an appearance was entered for them. Our rules of court provide, No. 129, as follows: "In actions of assumpsit, where the defendants are sued in a representative capacity and elect to file an affidavit of defence, the practice in taking judgments shall be the same as if they were sued in their own right."

As the defendant receivers did not elect to file an affidavit, judgment can not be taken against them. The court may make rules requiring an affidavit of defence by one sued in a representative capacity (Helffrich vs. Greenberg, 206 Pa., 516), but in the absence of such rule he is deemed not to be within the spirit of the law requiring an affidavit; and this was the ruling of the Supreme Court before as well as after the passage of the act of May 25, 1887: Mutual Life Insurance Co. vs. Tenan, 188 Pa., 239.

The property in the receiver's hands is in the custody of the law; the possession of the receiver is the possession of the court which appointed him. He has no personal interest in the property. He is responsible for the correct and faithful discharge of his duty, and nothing more. He acts under the advice of the court. He is an officer of the court. He acts in a representative capacity—so much so that it is sometimes held that suit may not be brought against him without the permission of the court which appointed him: Wray vs. Hazlett, 6 Phila., 155.

The rule must be made absolute.

And now, October 18, 1905, the rule to strike off the judgment as to the receivers, Alvin Hill and Robert B. Keys, is made absolute, and the judgment entered against them for want of an affidavit of defence is stricken off.

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A common law arbitration removes the case from the court. The arbitrators, being judges of the parties own choosing, are judges of the law and the facts; and their finding is conclusive, unless set aside for fraud, misconduct or partiality.

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A made an assignment for benefit of creditors and appointed B an assignee. B filed his account and had it referred to an auditor to make distribution.

A year after the assignment, and after the auditor had met several times, A, on his own petition, was declared a voluntary bankrupt, and B was appointed trustee. B as trustee then claimed the fund in his own hands as assignee. His petition to have the fund paid to him was refused. *Fister's Assigned Estate*, 43.

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A creditor will not lose his preference by bankruptcy proceedings where his mortgage is recorded more than four months before such proceedings are instituted, although he knew that the debtor was insolvent when he executed the mortgage, provided the transaction was honest. *Mott vs. Mott, Jr.*, 110.

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The property of an intestate passes at his death to those legally entitled to the succession subject to the claims of creditors and to the laws in force for administering it; but if there be no debts to pay, and no distribution needed, administration is not indispensable to give dominion over the property. Still less is the necessity for administration c. t. a. where the legatee in his life time took possession of a bond under an absolute bequest of all the testator's estate, although the judgment on the bond stood in the name of the testator at the legatee's death. *Norristown Trust Company. Adm'r, &c., vs. Lentz, Ex'r, &c.*, 180.
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A railroad company has the right to build a siding to a manufacturing establishment and to condemn land, if necessary, to reach such plant. *Potts vs. Philadelphia and Reading Railway Company et al.*, 142.

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Under the act of March 17, 1869, P. L. 12, the widening power of a railroad company is not exhausted at a given point by prior takings. *Haines et al. vs. Philadelphia and Reading Railway Company*, 32.

When a railroad company condemns land for purposes which appear to be necessary, the court will not interfere with the judgment of the company. *Ib.*

A railroad company can condemn land, although by so doing a land-owner is prevented from having access to a canal or river. *Ib.*

A land-owner is not entitled to a grade crossing to enable him to get from his land to a canal or river. If injured, his remedy is in damages. *Ib.*

Fires from sparks of an engine; evidence confined to engine designated in statement; identification of engine throwing fires on other nights; view by jury of engine and spark-arrester. *Shelly, Ex'trix, et al., vs. Philadelphia and Reading Railway Company*, 21.

RECEIVER.

Affidavit of defence—Rules of court. *Speck vs. Lansdale and Norristown Electric Railway Company et al.*, 215.

REPLEVIN.

Filing of counter bond. *Sickel vs. Reed et al.*, 171.

SHERIFF'S SALES.

A contemplating purchaser at a sheriff's sale is bound by all the notice that is disclosed by the record of the proceedings leading up to the sale. *Booth vs. Thomson et al.*, 118.

An issue can not be awarded on evidence so slight and insufficient that in case a verdict should be rendered thereon in favor of the petitioner, the trial Judge must set it aside. *Mott vs. Mott, Jr.*, 110.

A purchaser at sheriff's sale is bound by all the facts and notice that the record of the liens and proceedings discloses. *Booth vs. Thomson et al.*, 49.

Sheriff's sale bills after being properly posted were removed by storm. *Held*, not sufficient reason for a resale. *Norristown Trust Company vs. Haenni*, 138.

Misdescription. *Ib.*

Division into lots. *Ib.*

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SPECIFIC PERFORMANCE.

A decree for specific performance will not be granted if the transaction be inequitable and unjust in itself, and the inequity may be felt where it can not be so well pointed out. *Fry vs. Leopold*, 135.

STOCK.

Where the purchaser of shares of stock does not show that the stock has any special or peculiar value to himself, or that the damages for the failure to assign can not be ascertained, equity will not compel a transfer, because the claimant has an adequate remedy at law. *Henshall vs. Wilkinson Manufacturing Company*, 141.

STREET RAILWAYS.

Grade crossings of electric passenger railways. Regulation as to such crossings to be determined under the act of 1871, P. L. 136. *Pottstown Passenger Railway et al. vs. Trappe and Limerick Electric Street Railway et al.*, 148.

Grade crossings. One company acting with force condemned. Route over private right of way. Crossing at grade at a point other than at a highway crossing. *Pottstown Passenger Railway et al. vs. Limerick Electric Street Railway et al.*, 148.

SUMMARY CONVICTION.

The record of conviction for the violation of a borough or township ordinance should refer to the ordinance and at least show the substance of it; and also contain a finding that defendant had violated the special act complained of. *Lower Merion Township vs. Sutton*, 195.

TAXES.

Rebate of taxes. *Carver vs. Malsberger, County Treasurer*, 81.

Timber-land entitled to rebate. How tax payers may obtain benefit of the act of April 11, 1901, P. L., 77. *Ib.*

TURNPIKES.

Method of computing damages to be paid by the county for freed turnpikes. *Perkiomen and Sumneytown Turnpike Road Company vs. County of Montgomery*, 59.

Where a turnpike company occupies a county bridge in the construction of its roadway, it must keep such bridge in repair, under the act of March 17, 1845, P. L., 184. *Ib.*

WILL.

An absolute estate will not be reduced by a codicil which has no certain and definite meaning. *St. John vs Staples*, 114.

The following paper writing held to be testamentary: "The Model Farm, Gratersford, July 17, 1902. To the Provident Life and Trust Company, Fourth and Chestnut streets, Philadelphia, Pa.: Pay out of my estate the sum of $500 to Kate Detwiler for her kindness to me. Robert Greer." *Greer's Estate*, 26.

The delivery of a testamentary paper to the beneficiary, no present interest passing, does not make it irrevocable. *Ib.*

A legacy bequeathed to a trustee to pay income to life tenant and principal at death of life tenant, is entitled to interest on the same from the date of testator's death. *Lysinger's Estate*, 172.

A recovered judgment against B. Subsequently B's father died testate and by his will he devised and bequeathed the residue of his estate, real and personal, to his children in equal shares, and gave his executors authority to sell real estate and make conveyance. After the probate of the will B assigned all his right, title and interest in the estate to C, his heirs, executors, administrators and assigns. A's judgment was afterwards amicably revived. The real estate was sold by the executors, and brought into their account. A and C claimed B's share of the proceeds of the real estate. *Held*, (1) there was no equitable conversion under the will; and (2) that the assignment conveyed B's interest in the real estate and proceeds of its sale to C, and the latter was entitled to B's distributive share. *Shaner's Estate*, 207.

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A testatrix who died without issue directed the residuum of her estate, consisting of personalty, to be divided into six shares, and bequeathed, inter alia, one share to her brother Jacob and one share to the children of her deceased sister Catharine. Jacob died in the life-time of the testatrix, leaving issue surviving, to whom the share was awarded.

When the will was executed two children of the deceased sister Catharine were living, Lydia and Louisa; another child, Priscilla, had died before, leaving a son surviving. Louisa died before the testatrix, leaving issue three children. *Held*, (1) the son of Priscilla did not participate in the distribution, as his mother was dead when the will was executed; (2) the children of Louisa took her share under the act of July 12, 1897. *Harley's Estate*, 98.

A testator provided, "I give unto my dear wife the power to give and bequeath one-half of my estate remaining after her death to whomsoever she pleases, their heirs and assigns forever." The will of the wife provided that the balance of her estate and her share of her husband's estate should go to her nephews and nieces, children of her brothers and sisters, to be equally divided share and share alike. She provided, however, that if her sister, Elizabeth Dager, should outlive her, she should have the income of her children's share as long as she lived. *Held*, (1) the issue of the nephews and nieces (grand-nephews and grandnieces) of Harriet Kensel, who died before her will was made, are not entitled to participate in the distribution; (2) the wife had no power under the appointment to create a life estate for her sister, or to create anything less than absolute estate; (3) the trust fund of the husband's estate is not to be mingled with the wife's own estate and paid to her executors, but distributable direct to those entitled. *Kensel's Estate*, 67.

The same testator in another clause of his will provided, "I give and bequeath unto my brothers and sisters, their heirs and assigns forever, one-half of my estate remaining after the death of my wife, to be divided share and share alike." *Held*, (1) that the children of a nephew who died prior to the death of the testator did not participate in the distribution; (2) the act of 1897, P. L. 256, does not apply to the wills made prior to its passage; (3) although all the brothers and sisters were dead at the date of the testator's death, their issue living at the death of the testator are entitled to the shares their parents would have taken if living, *per stirpes*. *Ib.*

WITNESSES.

The death of an executor does not disqualify a witness as to matters occurring between himself and the executor, in a suit by the testator's estate, although such witness is also the executor of the estate against which the suit is brought. *Norristown Trust Company, Adm'r, &c., vs. Lentz, Ex'r, &c.*, 180.

Where a plaintiff calls a witness whom he knows will testify against him on the point for which he is called, he will not be allowed to introduce evidence to contradict the witness, there being no allegation of surprise or mistake. *Smith vs. Hagey*, 12.

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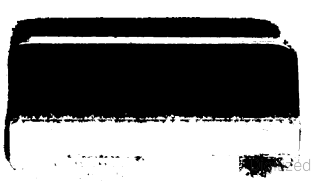
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